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In the Supreme Court of the United States

OCTOBER TERM, 1957

THE IVANHOE IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 122
THE MADERA IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 123
THE MADERA IRRIGATION DISTRICT, et al., *Defendants and Appellants,* vs. PHILLIP and JANE E. ALBONICO, *Plaintiffs and Appellees.*	No. 124
THE SANTA BARBARA COUNTY WATER AGENCY, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 125

On Appeal from the Supreme Court of the State of California

Brief for Appellees

OPINIONS BELOW

The opinions of the Supreme Court of California in the four cases, Nos. 122-125 (Appendices to Jurisdictional Statement, pp. 1, 139, 180, 205), are reported at 47 C. 2d 597, 306 P. 2d 824 (No. 122); 47 C. 2d 681, 306 P. 2d 886 (No. 123); 47 C. 2d 695, 306 P. 2d 894 (No. 124); and 47 C. 2d 699, 306 P. 2d 875 (No. 125).

The Appendices to Jurisdictional Statement (herein cited as AJS) include the opinions of the trial courts in these four cases but do not include their findings of fact and conclusions of law. For such findings and conclusions, see R. 111 (No. 122), R. 297 (No. 123), R. 411 (No. 124), and R. 603 (No. 125).

Under California law, it is the findings of fact and conclusions of law which control, not the trial court's opinion. See *Richter v. Walker*, 36 C. 2d 634, 642; *Strudthoff v. Yates*, 28 C. 2d 602, 615-616; *Stone v. L. A. County Flood Control Dist.*, 81 C. A. 2d 902, 907. It will be noted that in each case the judgment entered by the trial court recites that it is based upon the court's findings of fact and conclusions of law and makes no reference to the court's prior opinion (R. 176, 380, 419, 621).

JURISDICTION

The appeal in each case relies solely upon Section 1257(1) of the Judicial Code (R. 177, 398, 422, 650), which provides for review of a final judgment or decree of a state court by appeal "where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity." Specifically, appellants contend (Br., p. 3) that the appealable issues involve the validity of Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 636, 43 U.S.C. 423e, and Section 9(c) and (e) of the Reclamation Project Act of 1939, 53 Stat. 1187, as amended, 43 U.S.C. 485h(c) and (e). Appellants are forced to contend that the decisions below turned on a holding "against" the "validity" of these provisions.

Appellees filed a motion to dismiss the appeals and a supporting brief, contending that the judgment in each case rests on an adequate non-federal basis and that no

substantial federal question is presented. Similarly, appellees contended that, treating the appeals as petitions for certiorari as required by Section 2103 of the Judicial Code, no federal question of substance is presented sufficient to support the granting of the writ. On October 14, 1937 this Court entered an order deferring further consideration of the question of jurisdiction to the hearing of the cases on the merits. (R. 656.)

Appellees hereby renew their objections to jurisdiction, and devote Point I of the Argument, *infra*, p. 29, to this question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Constitution, Article XIV, Section 3:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such rea-

sonable and beneficial uses; *provided, however*, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

California Constitution, Article I, Section 11:

"All laws of a general nature shall have a uniform operation."

California Constitution, Article I, Section 13:

"* * * No person shall be * * * deprived of * * * property without due process of law * * *"

California Water Code, Section 102:

"*Water State Property: Acquisition of right to use water by appropriation.* All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."

California Water Code, Section 104:

"*Paramount interest of people in water: Determination as to conversion or control.* It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection."

California Water Code, Section 105:

"*Protection of public interest, and determination as to development.* It is hereby declared that the protection of the public interest in the development of the

water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit."

California Water Code, Section 1052:

"*Unauthorized diversion or use a trespass: Institution of injunctive action.* The diversion or use of water subject to the provisions of this division other than as authorized in this division is a trespass, and the department may institute in the superior court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined."

California Water Code, Section 22250:

"*Ratable apportionment of water among landowners.* All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes."

California Water Code, Section 23200:

"*Distribution and apportionment of water: Refusal of service to delinquent land.* All water, the right to the use of which is acquired by a district under any contract with the United States shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, and provision may be made in the contract for the refusal of water service to any or all land which may become delinquent in the payment of any assessment levied for the purpose of carrying out the contract."

Reclamation Act of 1902, Section 8, 32 Stat. 388, 43 U.S.C. 372, 383:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Omnibus Adjustment Act of 1926, Section 46, 44 Stat. 636, 43 U.S.C. 423e:

> "No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law * * * and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction."

Reclamation Project Act of 1939, Section 9(c), (d) and (e), 53 Stat. 1187 as amended, 43 U.S.C. 485h(c), (d) and (e).[1]

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1. Additional statutes pertinent to the cases are cited throughout the brief.

QUESTIONS PRESENTED

1. The Supreme Court of California held invalid certain purported contracts entered into between state irrigation districts[2] and the Federal Government, and which on their face were subject to confirmation in court proceedings, because unauthorized by, and in conflict with, state constitutional, statutory and decisional law. The court held that the irrigation districts lacked the capacity under state law to enter into such contracts and that their subject matter, the use of water for irrigation purposes, was controlled by state law. The court's opinions pointed to federal law as confirming the jurisdiction of the states in these matters. In the circumstances of these cases, was the validity of a statute of the United States thereby drawn in question within the meaning of Section 1257(1) of the Judicial Code, so that a substantial federal question is presented, or, to the contrary, do the judgments below rest on an adequate non-federal basis? Treating the appeal papers as petitions for writs of certiorari, are federal questions of substance presented sufficient to support the granting of the writs?

2. Assuming that substantial federal questions are presented, was the court below correct in its view that federal law leaves to state jurisdiction the capacity of state irrigation districts to contract, and the control, appropriation, use and distribution of water for irrigation purposes? Under the Federal Constitution could Congress, even if it elected to do so, override state jurisdiction in these matters?

3. If federal and state law purported to authorize the instant contracts, would landowners within the contracting districts be deprived of property without due process of

2. The term "irrigation district" or "irrigation districts", unless the context otherwise indicates, is used to include the Santa Barbara County Water Agency and its member units.

law and denied the equal protection of the laws contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASES

The trial courts made detailed findings of fact (R. 111, 297, 411 and 603), none of which has at any time been challenged by appellants.

The Ivanhoe Irrigation District and the Madera Irrigation District were organized and exist under comprehensive state legislation, known as the California Irrigation District Law, first enacted some 70 years ago. California Water Code, Sections 20500-29978. The Madera district, in fact, was organized in 1920 as a successor to a district organized in 1888. These districts are within the area of the Central Valley Project and receive supplemental water from it. (R. 114-117, 300.) Both of these districts were specifically designated by the State of California in 1935 for the use of Project water. (R. 126-127, 316-317.)

The Santa Barbara County Water Agency was organized and exists under a California statute of 1945, as amended, known as the Santa Barbara County Water Agency Act. Calif. Stat. 1945, Ch. 1501, p. 2780, as amended by Calif. Stat. 1949, Ch. 12, p. 18, 1 Deering's Calif. Water Code Ann., Act 7303 (1954). That Agency's so-called member units are also districts or political subdivisions of the state, organized and existing under state law. The Santa Barbara County Water Agency Act, as amended, Section 2(f) and (g). This Agency and its member units, consisting of the City of Santa Barbara and the Carpenteria, Goleta, Montecito and Summerland County Water Districts, secure supplemental water from the Cachuma Unit of the Santa Barbara County Project. (R. 603, *et seq.*)

The powers, obligations and responsibilities of such districts and agencies are controlled at every point by state law. Irrigation districts are authorized to contract with the Federal Government, in accordance with and within the limits of California law, namely, the California Irrigation District Federal Cooperation Law, California Water Code, Division 11, Part 6, Ch. 2, Section 23175, *et seq.* The Santa Barbara County Water Agency Act, as amended, Section 6, authorizes, *inter alia*, contracts in accordance with the California Irrigation District Federal Cooperation Law.

The Madera Irrigation District immediately after its formation in 1920 acquired the dam-site at Friant, California, on which Friant Dam is now constructed, and also acquired applications to appropriate water of the San Joaquin River which were filed on behalf of the district prior to its formation. (R. 220, 320-321.) These applications to appropriate San Joaquin River water are the earliest in time and priority of any of the applications referred to in these cases. On May 24, 1939 the district entered into a contract with the United States (R. 220) whereby the dam-site and the applications to appropriate water were transferred to the United States and wherein the United States agreed to furnish the district a supply of water, from Friant Dam through the Madera Canal, consisting of 270 thousand acre feet per annum.

The Ivanhoe, Madera and Santa Barbara Districts thereafter entered into contracts with the United States, acting by the Bureau of Reclamation, which for present purposes may be treated as substantially identical. The Santa Barbara County Water Agency, in turn, entered into contracts with its five member units. The first three contracts referred to and the contracts between the Santa Barbara County Water Agency and the City of Santa Barbara and the Mon-

tecito County Water District, which are typical of the latter class of contracts, are included in the printed record. (R. 12, 185, 477, 505, 537.)

Each contract requires that its validity shall be confirmed in court proceedings. Also, each contract requires the irrigation district involved to refuse water for irrigation purposes to land in excess of 160 acres held in single ownership unless the owner complies with burdensome conditions including sale of such "excess" land within a stipulated period not in excess of a price in the fixing of which he has no voice. Furthermore, the contract specifically prohibits delivery of water or other service by the district to any "excess" land which is sold by the owner at a price in excess of that approved by the Secretary of the Interior. For the procedure imposed by the Bureau of Reclamation, see its letter to Courtney McCracken, dated November 1, 1949, Appendix to this Brief. This letter restated the restrictions above mentioned, and requested designation of McCracken's non-"excess" land within thirty days. The contracts do not purport to assure a permanent water right; they run for 40 years, but with no provision for renewal.[3] The amounts charged for water include a capital component, but the contracting state district, agency or unit is not informed as to how much this is or as to when, if ever, the project will have been paid for. The contracts are further discussed under Point I of the Argument.

In accordance with California procedure, the contracts were submitted to the California Districts Securities Commission. Although approving the contracts, the Commission voiced doubts both as to their fairness and legality, but

3. The Madera contract refers to an option which may be exercised by the district for a continuation of the water supply provided in the contract of May 24, 1939. (R. 192, Para. 4.)

pointed out that at least the latter was for the determination of the courts. (R. 117-118, 302.)

Confirmation of these contracts was resisted by ninety-four landowners within the contracting districts, including both "excess" and non-"excess" owners. (R. 153-156, 298, 407, 411, 603.) Objection was made to the contracts on the grounds, among others, that they required discrimination against landowners who had faithfully supported the irrigation district of which they were members in the past and to whom the district owed a fiduciary responsibility;[4] as well as on the ground that the contract proceeded on the basis that the United States "owned" the water and failed to recognize a permanent water right in the users, contrary to state law. The Supreme Court of California held the contracts invalid on these grounds. (*Infra*, p. 31.)

The fourth case (No. 124) is not a validation proceeding although its outcome hinged upon the determinations of invalidity in the *Madera* proceeding (No. 123). In this case (No. 124) Phillip and Jane Albonico, owners of 1260 acres within the Madera Irrigation District, brought suit in the state court for a writ of mandate to compel the Madera district directors to exclude their land from the district in view of the provisions of the contract between the district and the United States denying their "excess" land water. The trial court specifically found that the lands which the Albonicos sought to be excluded "would not be benefited by the operations of the Madera Irrigation District", (unless water was delivered thereto), and that "no evidence was introduced" tending to show any such benefit at the hearing be-

4. For example, Courtney McCracken, a landowner within the Ivanhoe district, had paid his assessments to the district from the day of its organization. (R. 156.) As to assessments paid by Phillip and Jane Albonico, see *infra*, p. 77.

fore the district directors. (R. 412.) The trial court thereupon entered judgment in the alternative requiring either that the district supply water to all of the Albonico's lands, without discrimination, or that the lands be excluded from the district. (R. 418-420.) This judgment the Supreme Court of California modified by striking out the second alternative and, as so modified, the judgment was affirmed. (AJS 183.)

The participation of various state agencies and of the United States in these proceedings is of interest. Counsel for the Bureau of Reclamation appeared as *amici curiae* in the trial court in the *Ivanhoe* and *Madera* cases, but no appearance or presentation was made by the United States or any of its officers at the trial of the other two cases. No appearance or presentation was made in *any* of the four cases before the Supreme Court of California until subsequent to its decisions, several years after the entry of the trial courts' judgments. Only after the court below had decided the cases, in January, 1957, did the Government reappear, this time in the name of the United States as *amicus curiae* in support of various petitions for rehearing. Its offer to the court below at that stage to "explain and clarify" the issues, including one which it then discovered to be of "great constitutional importance", was duly declined.[5]

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5. As we pointed out in our Reply to Memorandum for the United States as Amicus Curiae in Support of Jurisdiction, the Government's record in these cases is suggestive of the "strange transaction" respecting California waters in which this Court found it had engaged in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 741-742. Certainly the Government's long period of silence while these cases were before the California courts does not add persuasiveness to its present plea for review by this Court. The inference arises, we submit, that during this extended period the Government failed to participate because it deliberately—and correctly—recognized that the issues involved are essentially matters of state law.

The record of the state agencies is hardly less confusing. The California Attorney General originally entered the *Ivanhoe* case to challenge the validity of the contracts as in derogation of state law. The answer originally filed by the state in the *Ivanhoe* case prayed that the contract be held invalid. (R. 50.) The present Attorney General reversed the state's position, filing an amended answer in the *Ivanhoe* case which, so far as the state was concerned, prayed that the contracts be held valid. (R. 77, 84-85.) The Attorney General in this Court has now assumed representation of the Ivanhoe Irrigation District, as well as of the state, as appellants.

The State Water Project Authority and the State Engineer were at the time of the trial of the *Ivanhoe* and *Madera* cases vested with important responsibilities with respect to state water law. (R. 140, 335-336.) Their functions, so far as now pertinent, have since been transferred to the newly-created Department of Water Resources and the State Water Rights Board. Water Code, Sections 120 *et seq.*, 175 *et seq.* The participation of the Authority and State Engineer was deemed so important by the trial courts, in these cases that, *sua sponte*, the courts invited their appearance. (AJS 4, 10, 140-141.) In the trial courts the Attorney General appeared for the Water Project Authority, as well as for the state, and the State Engineer was represented by separate counsel. The answers filed by the present Attorney General in the *Ivanhoe* and *Madera* cases was in behalf of both the state and the Authority. These answers requested validation of the contracts in behalf of the state but contained no such prayers for validity in behalf of the Authority. (R. 84-85, 241.) The answers of the State Engineer likewise took no position as to the validity of the con-

tracts in either the *Ivanhoe* or *Madera* cases. (R. 102, 110-111, 288, 296-297.)

Thereafter, the Attorney General in the *Ivanhoe* case first filed an appeal in behalf both of the state and the Authority, and then later dismissed the appeal as to the Authority. No appeal was filed for the Authority in the *Madera* case. The State Engineer did not appeal the judgments of invalidity and before the state supreme court urged the integrity of state water law.

The California Water Project Authority, the State Engineer, their successors, the Department of Water Resources and the Water Rights Board—none has manifested dissatisfaction with the decisions below by joining in the appeals to this Court.

The following background is also helpful to an understanding of these cases:

Immediately upon the admission of California as a State, the Legislature provided for studies of its water resources and problems. (AJS 13, *et seq.*) Various phases of these studies were in progress when, in 1913, the California Water Commission Act was passed (Stat. 1913, Ch. 586, p. 1012). The pertinent features of this Act, as continued and incorporated in the California Water Code, are these: Previous valid appropriations of water were recognized. A system of filing applications with designated State authorities was set up to gain such appropriative rights after 1913.

This system of appropriation was, during all of the times involved in these cases, recognized as the proper and the only method of acquiring a right to unappropriated water (we are not here dealing with riparian rights or prescrip-

tive rights). Water Code, Sections 1225, *et seq.*, 1052. During all of the times involved herein, the State Engineer, as the Chief of the Division of Water Resources, was charged with the duty of administering the State water laws. Water Code, Sections 201, 202.[6]

In keeping with the fundamental water law of the West, including in particular California, priority of right of an appropriator is fixed as of the date of the filing of the application (before 1913, on the date of the taking or posting of notice):

> "Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues so long as the provisions of law and the rules and regulations of the department are followed by the applicant." Water Code, Section 1450.

After hearing and determination of the application, a permit may be issued by the State Engineer. Water Code, Section 1375. This is followed by a license on completion of a project. Water Code, Section 1600, *et seq.*

Important is the fact that the State Engineer, in passing upon applications to appropriate, is given a measure of discretion, and is authorized to impose conditions in issuing permits and licenses:

> "The department shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." Water Code, Section 1253.

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6. These references are to the Water Code as it existed prior to the reorganization of state water agencies effected by California Stat. 1st Ex Sess. 1956, Ch. 52. See *supra*, p. 13.

During 70 years of state studies on water matters, a state-wide conservation plan had been developing. In 1921 a plan of this scope was authorized. In 1927, in contemplation of its utilization of the water resources of the state in the state plan, and, in particular, the waters of the San Joaquin River in the proposed Central Valley plans, the Legislature required the State Director of the Department of Finance to file applications to appropriate the unappropriated water of the state for the state and the areas to be benefited. Some 37 such applications were filed by the Director on behalf of the state on state streams in the Central Valley area, some of which were for the storage of water at Friant Reservoir on the San Joaquin River. (AJS 13-14.)

In 1933, the Legislature, in order to put to use the waters appropriated by the state in furtherance of the state's plan in the Central Valley of California, created the Water Project Authority of the State of California (Stat. 1933, Ch. 1042). The provisions concerning the Authority were, in 1943, codified into the Water Code as Section 11400, *et seq.* The Central Valley Project, as a state project, was in the same 1933 legislation defined by the Legislature, and, as so defined and enlarged, is found in the California Water Code, Section 11100, *et seq.*

Important in the 1933 statute defining the Central Valley Project, and creating the Water Project Authority as a "body politic and corporate with power of perpetual succession and with power to sue and be sued", are the provisions that:

> "* * * the authority shall have full charge and control of the construction, operation and maintenance of said Central Valley Project and the collection of all rates, charges, and revenues of whatsoever character

> therefrom. The authority shall proceed with the construction of said Central Valley Project immediately upon there being made available funds for such work * * *". Stat. 1933, Ch. 1042, Section 15, page 2654; Water Code, Sections 11451, 11452.

The Authority was given power to contract for the carrying out of some of its functions, and power to contract with the United States (Stat. 1933, Ch. 1042, Section 15, first paragraph, page 2654; Water Code, Section 11500). The Act of 1933 specifically provided for the construction of Friant Dam, the Madera Canal (to serve the Madera District, *et al.*), and the Friant-Kern Canal (to serve the Ivanhoe District, *et al.*) (Stat. 1933, Ch. 1042, Section 4(4) (5) (6), page 2645; Water Code, Sections 11225-11226, 11230-11231, 11235-11236).

Although the Authority was authorized to issue $170,000,000 in bonds to finance the Central Valley Project, the depression market for bonds was not favorable. The Authority then applied to the Federal Emergency Administration of Public Works of the United States for a loan and grant to the Authority as a state agency (see McCracken Exhibit 18, *Ivanhoe*, Rep. Tr. 87, April 3, 1951). The loan was to be used by the Authority for its construction of the Project, and to be repaid by it to the United States (R. 123-124).

Instead of a loan and grant, funds were made available to the Secretary of the Interior, under the Emergency Relief Appropriation Act of 1935. The Bureau of Reclamation established an office in Sacramento, and started work on the Project. Thereafter, the Project was reauthorized by Congress as a reclamation project under the reclamation law. (AJS 17-18.)

The Authority, however, having a duty under the Central Valley Project Act to construct the project, collect the revenues, and repay the Federal Government, in 1936 entered into a "Memorandum of Understanding" with the United States, which provided, among other things:

> "13. It is further contemplated that a contract will be entered into between the United States and the Water Project Authority providing for (among other matters):
>
> (a) The operation and maintenance by the Authority of useful units of the Project, upon presenting assurance of payment satisfactory to the United States of the cost thereof;
>
> (b) Appropriate payment by the Authority to the United States for expenditures in construction of the Project;
>
> (c) The securing by the Authority of the appropriate contracts for disposal of facilities to be made available by the Project."

(See McCracken Exhibit 20; *Ivanhoe*, Rep. Tr. 91, April 3, 1951; R. 123-124.)

This contract was never revoked or cancelled, and stands as the basis of the relations between the United States, the Authority and the State of California (R. 124). In 1940, after repeated demands by the then Governor of California for a contract, a meeting between the Authority and representatives of the United States was finally obtained. The United States flatly refused a contract, or to permit the Authority to exercise its functions under the Central Valley Project Act and the Water Project Authority Act. (R. 124-125.) The United States' position was typified by the following statement of the federal representative:

> "Mr. Wright: I should say, sir, that inasmuch as it is the intention of the Department of Interior and the

Bureau of Reclamation to operate this Project, to operate the main features of it, that any contracts that are entered into would have to be between the United States and the water users. Naturally, it would be appropriate that those contracts be a matter of negotiation between the United States and the water users. Such assistance as the State might be in the organization or furthering of water users association or similar associations, I would think would be eminently proper and useful, but for the State to attempt to act as a third party, as a go-between, between the water users and the United States, it seems to me would be a waste of effort." (McCracken Exh. 83, p. 61, *Ivanhoe*, Rep. Tr. 8, April 16, 1951.)

Of the 37 water applications filed by the State Director of Finance (AJS 13-14), there is particular interest in numbers 5637, 5638, and 9369, relating directly to Friant Dam and Reservoir, and the Madera and Friant-Kern Canals. By 1939, the United States had sought *unconditional* assignments of these and other applications filed by the Director of Finance. (McCracken Exh. 32, p. 28, *Ivanhoe*, Rep. Tr. 106, April 3, 1951, offered by state.) Such unconditional assignments were refused. The assignments of these three applications, as well as other assignments accepted by the United States, were made by the State on the express condition that they ran to the United States, acting by its Bureau of Reclamation,

"for the use and benefit of said Central Valley Project, California." (Exh. C to amended answer of State of California and Water Project Authority, *Ivanhoe*, R. 92, 94-95; R. 127, 316.)

There are numerous assignments to the United States by the California Director of Finance on the same or similar terms. In addition to these, there are numerous applications

filed directly by the United States with the California Division of Water Resources (now the State Water Rights Board). In processing these applications, the United States, acting through the Bureau of Reclamation, has consistently followed state law. Prior to the issuance of licenses, under the state statutes reviewed *supra*, p. 15, the State Engineer, and now the State Water Rights Board, issues permits for the construction of dams and the diversion of water. At the time of the writing of this brief, but subsequent to the opinions filed below, permits have been issued to the United States on various units of the Central Valley Project. Among these are the Sly Park Project and the American River Project, at Folsom. The State Engineer in his order on the Sly Park Project conditioned the permits issued to the United States as follows:

> "2. The right to divert and store water, and apply said water to beneficial use as provided in this permit is granted to the United States as trustee for the benefit of the public agencies of the State, together with the owners of land and water users within such agencies, to be supplied with the water which is the subject of this permit.
>
> "3. Any and all rights acquired or to be acquired pursuant to this permit are and shall be permanent and, except where water is distributed to the general public by an agency in charge of a public use, shall be appurtenant to the land to which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California; and further subject to the right to dispose of a temporary surplus.
>
> "4. Upon completion of the project contemplated under this permit and the application of the water to

beneficial use, any license or licenses which may be issued pursuant to Chapter 9 of Part 2 of Division 2 of the California Water Code shall be issued to the public agencies of the State within which the water has been found by inspection by the State Engineer to have been applied to beneficial use." (Decision A 13707, 13708 D 855, decided June 22, 1956, State of California, Department of Public Works, State Engineer, In the Matter of Applications 13707 and 13708 by the United States of America * * * Sly Park.)

Conditions similar to the foregoing quoted provisions of the Sly Park permit were also attached to the permits issued to the United States on its applications Nos. 13370, 13371, 13372 and 14662, American River, by the order of the State Water Rights Board, dated March 19, 1958.[7]

A few additional facts are stated at pertinent points in the Argument.

SUMMARY OF ARGUMENT

Decision in the four cases turns on the validity of certain purported contracts entered into between the United States, acting by the Bureau of Reclamation, and various California irrigation districts, organized and existing under state law. The contracts on their face required validation in judicial proceedings; the Supreme Court of California held them invalid. The Federal Government is not here exerting any regulatory or coercive power, such as the power to regulate interstate commerce. Neither navigation nor public lands are involved. The relevant enactments make it crystal clear that Congress has deliberately elected to proceed solely by

7. These official actions of the State Engineer and the State Water Rights Board on applications filed and prosecuted by the Bureau of Reclamation are obviously available to all of the parties, and the Court may take judicial notice of them.

way of contract, with such state created agencies as have the capacity under state law to enter into such contracts. A contract of this character is necessarily invalid if the state agency lacks capacity to enter into it. This is first and last a matter of state law.

I.

The appeals should be dismissed and certiorari denied because the decisions below rest on an adequate state ground and no substantial federal question is presented. In response to appellees' motion to dismiss, the Court on October 14, 1957 entered an order deferring further consideration of the question of jurisdiction to the hearing on the merits. The fuller consideration now made possible requires dismissal and denial of certiorari.

Analysis of the opinion of the Supreme Court of California in the *Ivanhoe* case, which was expressly relied upon for the result reached in the remaining three cases, demonstrates that decision turned on the court's holding that the irrigation district lacked the capacity under state law to enter into the particular contract here involved. The court held the Ivanhoe, and the contracts involved in the other cases, invalid because the district was required to discriminate against its own members in supplying irrigation water and because the contract failed to recognize a permanent water right. Both of these grounds were based on the proposition that under California statutory and constitutional law an irrigation district lacks power to enter into a contract of this kind. Federal law, notably Section 8 of the Reclamation Act of 1902, was appropriately (although not necessarily) referred to by way of confirming the force and effect of state law.

Although the State Water Code, Section 23200, permits irrigation districts to include in contracts with the United

States provisions conforming with the "applicable" federal enactments, the court held that this could not save the instant contracts. If their terms were required by federal law, such law could not be considered "applicable" within the meaning of the state statute.

The court's reliance on state law is further shown by its reference to the constitutional protection afforded water users. It is undisputed that here the court was referring not to the Federal but to the California Constitution, Article I, Sections 11 (uniformity of treatment) and 13 (due processes). The court squarely held that, had the California Legislature attempted to validate these contracts, it could not have succeeded because this would have been an avoidance of "all of the laws of the state, both constitutional and statutory" respecting the regulation and control of such matters (AJS 58-59).

Accordingly, under the well-settled principles applied in numerous decisions of this Court, there is no basis for review. This Court cannot undertake to invest state irrigation districts with a contractual capacity which they lack under state law. An opinion of this court, in the words of *Flournoy v. Wiener*, 321 U.S. 253, 261, would hence "be advisory only".

II.

In the remaining portions of the Argument, it is assumed that a substantial federal question is presented. On this assumption, it will be seen that the Supreme Court of California correctly answered it. The evidence is overwhelming that Congress has left within state jurisdiction the capacity of state irrigation districts to contract and the control, appropriation, use and distribution of water for irrigation purposes. Section 8 of the Reclamation Act, which has been reaffirmed by the Congress as late as 1956, explicitly pro-

vides that nothing therein shall interfere with such state jurisdiction with respect to irrigation waters.

Likewise, the decisions of this Court consistently and vigorously affirm that Congress has left these matters to state jurisdiction. The decisions of the Court from, for example, *California-Oregon Power Co. v. Beaver Cement Co.*, 295 U.S. 142, through *Mason Co. v. Tax Comm'n.*, 302 U.S. 186, and *Ickes v. Fox*, 300 U.S. 82, to *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, would have to be overruled if appellants' contention as to the supremacy of federal law were accepted.

III.

Had Congress attempted to override state law, which it did not do, its action would have conflicted with the Federal Constitution. Congress here, as we have seen, is not exerting any regulatory or coercive power, but is relying upon its authority to tax and spend for the general welfare (and possibly its property acquiring and disposing power). In exercising the taxing-spending-general welfare and property powers, the Government may not regulate and coerce to the point of overriding state law. The decisions of this court from *Kansas v. Colorado*, 206 U.S. 46 through *United States v. Butler*, 297 U.S. 1, and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 to the present time establish this limitation where the powers of the Federal Government are restricted to these constitutional sources of authority.

If the Court were now to hold that, in defiance of state law, the Federal Government may invest an irrigation district with a contractual capacity which it lacks under the law of its creation, or may override state irrigation law, it would be necessary to overrule decades of precedents. If the time should come when under the general welfare and

property acquiring and disposing powers the Federal Government could override state law, it would then be idle to speak of a Central Government of limited powers. At this point that distinctive American contribution—federalism—would be at an end.

IV.

Finally, we point out that if an irrigation district could be compelled to accept the terms of the present contracts, there would result a denial of due process and equal protection to its member-landowners, contrary to the Fourteenth and (to the extent applicable) the Fifth Amendments. By the terms of the contract, the irrigation district would be compelled to breach its fiduciary responsibility to its members and to deny them inchoate and vested rights under California constitutional and statutory law. Such a deprivation and denial cannot be justified on any illusory claim that a federal subsidy is being offered, or on any other ground.

As in the case of the discussion under III, above, we do not anticipate that the Court will find it necessary to reach questions under the Fourteenth and Fifth Amendments. The grave constitutional issues which would be presented, should the Court reach them, invite affirmance of the judgments below on other grounds.

For these reasons, the appeals should be dismissed and writs of certiorari denied, or, should the Court believe that a substantial federal question is presented, the judgments should be affirmed. Other alternatives would be presented only in the event that, contrary to our contentions, the Court does not dismiss, deny or affirm. Even in that event the Court would not be warranted in ending the litigation by reversing the judgments below. Questions of state law would still

remain for determination by the Supreme Court of California, including if necessary issues heretofore left undecided.

Dismissal, denial or affirmance will not mean, we submit, that federal reclamation will come to an end and that the projects existing in California will fall into disuse. On the contrary, the way will then be open for new arrangements or contracts fair both to the people of the nation as a whole and the people of California.

ARGUMENT

These cases consist of three contract validation proceedings (Nos. 122, 123 and 125) under the California Water Code, in which the Supreme Court of California held the contracts invalid; and a fourth case (No. 124), which turned upon these holdings (specifically, the holding of invalidity in No. 123). The single ultimate question in each case, therefore, is the validity of the pertinent contract; other issues are involved only to the extent that they bear upon the ultimate question of validity.

For the reasons stated in the motion to dismiss the appeals and supporting brief, no substantial federal question is presented and the appeals should be dismissed. By its order of October 14, 1957 the Court deferred further consideration of the question of jurisdiction to the hearing on the merits. (R. 656.) The fuller consideration now made possible will, we believe, confirm the result of dismissal.

Should the Court believe, however, that a substantial federal question is presented, we submit that consideration on the merits will require decision that the federal law itself refers the matter to the jurisdiction of the state, upon which the Supreme Court of California has the final word. The argument so far is developed under Points I, II and III below.

As further grounds in support of the judgments below, we maintain that the federal statutes relied upon do not warrant various provisions of the contract in issue and, if so applied, would violate the rights of members of the contracting state districts contrary to the Fifth and Fourteenth Amendments. These grounds are presented under Point IV below.

Before proceeding with Point I, we outline the decided shift in position and emphasis which appellants have somehow managed to execute between the time of their appearance in the state courts and this Court. This analysis may be helpful both in understanding references to the position of the parties in the opinions of the Supreme Court of California (*e.g.*, see *infra*, p. 34) and the character of appellants' argument before this Court. Appellants' flexibility is shown in tabular form as follows:

APPELLANTS' POSITION IN

The California Courts	The Supreme Court of the United States
As to the trust character of the waters:	
The integrity of the State constitution and statutory laws respecting water must be protected.	
The state is trustor of an express trust relating to the use of water in the Central Valley Project.	The trust theory accepted by the Supreme Court of California is wholly erroneous; its sole justification is to prevent validation of the contracts (App. Br., pp. 11, 33, 56-57, 60.)
The United States is trustee for the use and benefit of the beneficiaries of the Central Valley Project waters.	
The applications of the State Director of Finance to appropriate the waters for the project were made for the use and benefit of the owners of the lands to be benefited.	No "rights", either of landowners or of the state, "are involved", since "the United States can acquire whatever rights it needs, and since the acquisition is not contingent on payment in advance." (App. Br., pp. 22-25.)
In the assignments of the above applications the state is trustor,	

the United States is trustee and the landowners are the beneficiaries. (See Paragraphs I, VI and VIII of the amended answer of the state, R. 77, 81, 82.)

As to the force of Section 8 of the Reclamation Act:

The Secretary of the Interior under Section 8 of the Reclamation Act is required to conform to state law as to the appropriation, control and distribution of waters. (Reply Brief, *Ivanhoe*, State Supreme Court, p. 29.)	The California Supreme Court indulged in a "tortured interpretation of section 8 of the Reclamation Act of 1902." The court's insistence upon the integrity of California water law is based upon an "erroneous interpretation" of Section 8. (App. Br., pp. 24, 58, 80.)

As to the necessity of the United States' proceeding to secure water rights under California law, and as to the proposition that the United States' rights in water for irrigation purposes, however obtained, cannot be greater than permitted under California law:

The United States must secure permits under state law to appropriate and use water. (Reply Brief, *Ivanhoe*, State Supreme Court, p. 30.)	The United States under federal law may obtain an "unlimited title" in the water. Appropriations under state law give no right which can be protected against an exertion of federal power. If the contracts in issue are consistent with federal law, it is immaterial that they are contrary to state law. (App. Br., pp. 61, 80-82.)

As to the permanency of the water right to be obtained by landowners within the districts:

The controlling state law assures a perpetual water supply. (Reply Brief, *Ivanhoe*, State Supreme Court, p. 28.)	California landowners have no water rights which the United States must respect. No duty exists as to permanent water delivery. (App. Br., pp. 23, 33.)

Certain of these shifts in position and emphasis will be further referred to in the course of our argument.

I. This Court Should Refuse Jurisdiction Because the Judgment, in Each Case, Rests on an Adequate Non-Federal Basis and No Substantial Federal Question is Presented.

A. WHERE THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS THIS COURT WILL NOT TAKE JURISDICTION.

Chief Justice Stone has stated the principle which, we submit, controls the instant cases, as follows:

> "* * * we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here." *Flournoy v. Wiener*, 321 U.S. 253, 262.

The reason for this rule

> "is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Mr. Justice Jackson, speaking for the Court in *Herb v. Pitcairn*, 324 U.S. 117, 125-126.[7a]

The foregoing quotations summarize the holdings in these two cases, which are in accord with numerous other cases

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7a. Of the present members of the Court, Mr. Justice Frankfurter dissented in *Flournoy v. Wiener* and Mr. Justice Black and Mr. Justice Douglas dissented in *Herb v. Pitcairn*. Their dissents clearly did not go to the rule as stated in the passages above quoted, but rather to its application to the particular facts of these cases, both of which presented difficulties absent, we believe, from the instant cases.

applying the same rule. *Murdock v. City of Memphis*, 20 Wall. 590, 636, 638; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157, 163-164; *Lynch v. New York*, 293 U.S. 52, 54-55; *Fox Film Corp. v. Muller*, 296 U.S. 207; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120; *Black v. Cutter Laboratories*, 351 U.S. 292.

B. THE JUDGMENTS OF THE SUPREME COURT OF CALIFORNIA ARE BASED ON STATE, NOT FEDERAL, LAW.

The principle consistently followed in the foregoing cases applies with compelling force to these appeals. Here, as we shall see, the judgments in strict accuracy rest not "in part on a non-federal ground" but wholly on state grounds. Federal law was appropriately (although not necessarily) referred to by the Supreme Court of California, but only to confirm the application of state law. Appellants' assurance that "The grounds of invalidity of the contracts are all federal" (Br., p. 17) is as astonishing as it is erroneous.

The four cases involved in these appeals are closely related, the court below writing its principal opinion in the *Ivanhoe* case. We shall first review the court's conclusion and reasoning in that case, and then consider any differences or additional issues presented in the other three cases, noting in the course of our review the application of the above-cited and other decisions of this Court.

1. The Ivanhoe Decision.

The critical issue in the case. It will be seen that the Supreme Court of California noted at the outset of its opinion in the *Ivanhoe* case that what is here involved is a *contract*, subject to *confirmation* in the instant proceeding. Although various matters are to be considered as "neces-

sarily incident thereto"; the "judgment is limited to a determination of the validity of the contract" (AJS 2-3). The opinion repeatedly and correctly sounds the theme that the essential issue, to which all else is subordinate, is whether a purported contract to which one of the parties is a public agency of the state should be confirmed in a statutory proceeding established by state law. The Court points out, citing the California Water Code, Section 22680, that "if the contract fails of confirmation on one material ground it must fail of confirmation as a whole" (AJS 11).

Grounds of invalidity of the contract. The Court held the Ivanhoe contract invalid on the following grounds:

1. Articles 34, 35, 36 and 37 cannot be legally justified under California law (AJS 51); in fact, if the California legislature should seek to validate such provisions, its action would be in conflict with the State Constitution (AJS 59). The articles of the contract referred to (R. 36-40) purport to require the Ivanhoe Irrigation District to deny water to land in excess of 160 acres held in single ownership by one of its members unless such member shall sign a so-called recordable contract with the United States agreeing to sell his land in excess of 160 acres at a price determined by appraisers in whose appointment the landowner has no voice, etc.

2. The contract fails to acknowledge the existence of a permanent water right in the district and its members, contrary to state law; and it necessarily implies that the United States, upon the contract's expiration at the end of 40 years, reserves the right to renew or not to renew, on such terms as it may then propose and, if the contract is not renewed, to take the water elsewhere. This is contrary to both state statutes and constitution. (AJS 55-56, 58-59.)

Various other provisions of the contract which were challenged below, the Supreme Court of California upheld as valid. However, on one sharply contested issue, the court deferred judgment. It was contended by appellees that the district's notice of special election (District's Exh. F, *Ivanhoe*, Rep. Tr. 46, April 3, 1951) contained no information relative to what the portion of the construction costs of the Central Valley Project chargeable to the district was or would be, in defiance of the California Water Code, Section 23223, which requires such information to be in the notice of election. The court found it unnecessary to pass upon this challenge, despite the fact that the trial court had concluded that the contract was also invalid on this ground (R. 118-119, 168). The court observed that this question need not be determined since the contract was being held invalid on other grounds and "for the reason that upon any submission of any further proposed contract" the claimed error need not recur (AJS 62).

Application of California law concerning the use of state waters and the powers of irrigation districts. In support of the determinations of invalidity summarized in the numbered paragraphs 1 and 2 above, the court's opinion turns to a discussion of the nature of the title which may be secured in the unappropriated waters of the state or by the state itself as the result of its appropriations or other acquisitions of water rights. Many pages of the opinion are devoted to the historical development of California law as to the use of water for irrigation purposes (AJS 12-21, 23-33). Emphasis is placed upon Section 3, Article XIV, of the California Constitution, as amended in 1928, which declares the policy of the state to be that its water resources shall be put to beneficial use as to the fullest extent to which they are capable (AJS 25-27). Stress is also laid

upon Section 22250 of the State Water Code, which requires that water distributed by irrigation districts shall be apportioned ratably to each landowner upon the basis of the assessment made against him, without discrimination (AJS 46-47). Similarly, Section 22252 of the State Water Code forbids discrimination when water is delivered by a district on the basis of toll charges. Several other sections of the State Water Code—i.e., Sections 102, 104, 105 and 1052—are cited and quoted for the proposition that, under state law, domestic waters for irrigation shall be put to their highest beneficial use and that water users, present and potential, have both vested and inchoate rights to secure the use of state waters on an equal and non-discriminatory basis (AJS 27-29).

In referring to the "inchoate rights of present and potential water users of the state" (*e.g.* AJS 32), deriving from the applications filed by the State Director of Finance and the trust character of the waters, the Supreme Court of California was laying hold of no new or novel principle. In cases where a formal appropriation (posting, filing, or filing application) has been made, but the works are not yet completed and no water has been put to use, the California courts have long held that the resulting right, with related priority back, is a species of real property, and is subject to protection in the courts. In *Inyo Cons. Water Co. v. Jess*, 161 Cal. 516, 521, it was held:

> "This incomplete right, although not as yet a title, is an interest in the realty".

Merritt v. City of Los Angeles, 162 Cal. 47, which is to the same effect, referred to the *Jess* case as follows (pp. 50-51):

> "It was there decided that such a claimant to the use of water has an incomplete, incipient, conditional right

> in the water, which is a vested interest in the real property and which may be adjudged to be such * * *"

In *Byington v. Sacramento Valley Etc. Co.*, 170 Cal. 124, an appropriation had been made by filing at a point many miles from the irrigation district area. The landowners in the *de facto* district sued to prevent the water from being taken to another area. The works were not complete, and no water had yet been put to use. The court held (pp. 131-132):

> "The right to the use of water appropriated to the public may be enforced by one of the community or class entitled to its enjoyment, regardless of title * * * Plaintiffs assert that they are entitled to protect themselves by resort to a court of equity from the dissipation of their rights before the water shall be conducted to a place near their property; from the sale of water outside the district for which it was appropriated; and from the creation of preferential classes who will dispute with them their title to the water which they have as residents of the district * * * a court of equity may entertain an action to quiet title to water not immediately available and may grant appropriate relief."

The Supreme Court of California concluded that under state law "the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust" and that "the trust character of that title is anchored in the state by constitutional provisions, by statutes enacted in furtherance thereof, and by the decisional law of the state" (AJS 32). In this connection, the court observed there was no dispute between any of the parties appearing in the litigation as to the nature of that title (AJS 12, 21-22).[8]

8. Supporting the court's statement that there was no dispute among the parties as to the nature of the limited title which might be secured in the unappropriated waters of the state, the court early

Similarly, the opinion discusses the nature of an irrigation district under California law. Citing prior state decisions, the opinion points out that an irrigation district is a "trustee for the landowners within the district and limited

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in its opinion summarized as follows a pertinent portion of the pleadings:

> "Paragraph VIII of the state's amended answer alleges that by virtue of the terms of the applications [to appropriate water] the state has become and is the trustor of an express trust; that by the assignments the United States has become and is the trustee of that trust; that the landowners to be served from the works of the Central Valley Project, including the landowners of plaintiff district, have become and are the beneficiaries of that trust; that any and all claims or interests of the United States obtained by the proposed contract are held by the United States as such trustee as a part of a trust corpus or res for the use and benefit of the Central Valley Project and the landowners to be served water from the works of that project, and in particular the landowners of Plaintiff District, that the State of California is entitled to be heard, among other things, as to all matters relating to the administration and execution of the trust by the United States and is entitled to require that the trustee administer the trust according to its true intent and meaning." (AJS 8.)

The full text of Paragraph VIII of the state's amended answer is to be found at R. 82. See *supra*, p. 27.

In view of appellants' newly discovered antipathy to the "trust" theory (Br., pp. 56-57), the following passage from Attorney General Brown's opinion of January 5, 1955, 25 Ops. Cal. Atty. Gen. 8, 11, is also of interest:

> "The effect of the 1927 legislation was to withdraw the then unappropriated waters of the State filed on by the Department of Finance from any further appropriation by private parties. And, if any further implementation of prior law was needed, the 1927 act established a procedure whereby, within the concepts applicable to privately owned water rights, the State in its *role as trustee for the people* could fairly be said to perfect its own 'right' to water needed for the general or co-ordinated plan to the exclusion of all other persons or parties." (Emphasis ours.)

We also invite the Court's attention to Trelease, "Government Ownership and Trusteeship of Water", 45 Cal. L. Rev. 638. Referring to the "trust theory" of the Supreme Court of California in the *Ivanhoe* case, the author observes (p. 645): "Actually, the concept is quite old."

in its trust to receive and distribute water to them." Moreover, the court pointed out, quoting from one of its earlier opinions, an irrigation district, unlike a municipal corporation, has only the legal title, as trustee, of the property which it holds, and "the beneficiaries of the trust—who, upon familiar equitable principles, are to be regarded as the owners of the property—are the landowners in the district with whose funds the property has been acquired * * * and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water." (AJS 29.)

The opinion makes no pertinent reference to federal law until it has concluded its discussion of the limited title, in trust, which may be secured in the unappropriated waters of the state, and the trust relationship between an irrigation district and its members. It then (AJS 33-35) discusses Section 8 of the Federal Reclamation Act of 1902, in confirmation of the validity of the state constitutional, statutory and decisional law with respect to the rights which may be secured in water for irrigation purposes. This important provision we consider under Point II, *infra*, pp. 48-49. The court concluded its reference at this point to federal law, which covers only two pages of its opinion, as follows (AJS 35):

> "We therefore feel free to declare that in all transactions between the United States and the State of California or its agencies such as the plaintiff district, the parties are dealing with trust property held by the state or by those who have acquired rights to it from the state or otherwise for the benefit of the real owners thereof. They are the present and prospective water

users of the state who may become entitled thereto under the laws of the state. Whatever interest or title the United States has acquired to water by appropriation, assignment or by other means of acquisition in furtherance of the execution of its trust relationship with the water users of the state is necessarily subject to the limitations of title herein determined."

The case at this point is suggestive of the holding of this Court in the *Fox Film* case, above cited:

"The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau v. Gibson*, 111 U.S. 200; *Chapman v. Goodnow*, 123 U.S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear." 296 U.S. at p. 211.

The court fully considered Section 23200 of the California Water Code, which permits irrigation districts to contract with the United States for a water supply and to distribute and apportion the water in accordance with the "applicable" acts of Congress. The opinion expresses doubts that certain provisions of the Reclamation Act were intended to extend to privately-owned lands (AJS 49-50). The court very clearly, however, did not base decision upon such an interpretation of the federal act, but simply held that if the federal act should be construed to apply to privately-owned lands,

"such construction would obviously remove it from consideration as an 'applicable' law governing the execution of the contract in question. *Since its attempted application to the contract is unauthorized under the laws of this state it is necessarily not an 'applicable' law.*" (AJS 50.) (Emphasis ours.)

A few lines later, the court holds, referring to the section of the Water Code in question:

> "Section 23200 contemplates that *applicable* federal law shall apply." (AJS 51.) (Emphasis the court's.)

Later, in considering other provisions of the contract the court refers to the controlling force of "the applicable water law of this state." (AJS 56.)

Appellants argue that where a state statute incorporates, or even refers to, federal law, its interpretation itself becomes a federal question. (App. Br., pp. 38-39.) If the case now turned upon this issue, a starting point for discussion would be *Miller's Executors v. Swann*, 150 U.S. 132, 136-137, where the Court held:

> "The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question."

To the same effect is *Louis & Nash R. R. v. West. Un. Tel. Co.*, 237 U.S. 300, 303; *Cf. Flournoy v. Wiener*, 321 U.S. 253, 260.

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9. Before this Court it would seem unnecessary to argue at length the grounds presented to the Supreme Court of California in support of the conclusion which it reached that various provisions of the federal law are not "applicable" law within the meaning of Section 23200 of the State Water Code. Reference may be made, however, to the action of the California Legislature, called to the attention of the court below, memorializing the then Director of Public Works and the State Engineer to assure that:

> "licenses issued to the United States for irrigation purposes in connection with federal reclamation projects be limited to water subject to contracts between public agencies of the State and the United States which the State Engineer finds to be in the public interest *and to conform to state law* * * * " (Emphasis ours.)

See Stat. 1953, pp. 272, 273, 274 and 405, 406, 407, Ch. 24 of the 1952 Regular Session and Ch. 4 of the 1952 First Extraordinary Session.

It is difficult to see, however, that any incorporation or reference problem is presented since the question at the outset is whether the state statute has in fact adopted federal law. This would seem, first and last, a state question. The California Legislature was under no obligation to enact Section 23200 in the present or any other form. In deciding to permit irrigation districts to contract with the United States, California was entitled to prescribe, within constitutional limits, the provisions which such contracts might contain so far as the power of its irrigation districts is concerned. Likewise, it was entitled to decide what it meant by "applicable" federal law, and it is up to the highest court of the state finally to declare the legislative policy in this regard as it is to be found in the statute.

The court also discussed the debtor-creditor relationship contemplated by the contract, questions as to the title to the works, the permanency of water rights, and the ascertainment of the total amount for which the irrigation district was liable. (AJS 38-40, 52-56.) Although appellants argue that thereby substantial federal questions were raised, it seems clear that the court below, of necessity, was looking at the matter from the standpoint not of federal right but of irrigation district responsibility, fiscal and otherwise, under California law.

Under that law, the landowner long before the expiration of 40 years would have acquired by use a vested right, appurtenant to the land, in the water supply. It could not be defeated by the refusal of the supplier to renew a contract. On the other hand, where water under California law is distributed for irrigation purposes by a utility company under circumstances which do not give the user a vested right, the supplier is nevertheless bound to make distribution to the public without discrimination or preferences, in

accordance with the state's, and not its own, conception of public policy. *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82; *Butte Co. W.U. Assn. v. Rd. Commission*, 185 Cal. 218, 224. Such water companies are subject to regulation by the State Public Utilities Commission (Pub. U. Code, Div. 1).

As the court below held, "under the controlling state law, the furnishing of water to consumers by a utility must be subject to and be in conformity with certain rules and regulations established by or under the authority of the Constitution and the statutes of the state * * *. If this contract were construed as imposing upon the districts and the landowners therein a burden under which they may suffer the loss of water rights at the discretion of the United States, such a construction would be contrary to well established constitutional principles and protection."[10] (AJS 55-56.)

Application of California Constitutional provisions. The opinion at several points refers to the constitutional protection afforded state water users against denial of due

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10. The Act of July 2, 1956, 70 Stat. 483, 484, referred to *infra*, p. 49, which was enacted long after the instant contracts had been signed, and while the cases were pending below, was obviously designed to correct some of the uncertainties—and inequities—now under discussion. See the Senate Report on the Bill, Senate Report No. 2241, 84th Cong., 2d Sess. The Act requires the Secretary of the Interior, "if the other contracting party so requests," to include repayment and other provisions in the contracts, including mandatory renewal, quite different from those in the contracts before the court below and this Court. Section 2 of the Act gives the Secretary authority "to negotiate amendments to existing contracts * * * to conform said contracts to the provisions of the Act."

The irrigation districts now before the Court have not had an opportunity to avail themselves of the renegotiation procedure. Were the present contracts to be renegotiated under this Act, it is evident that they would be instruments quite different from those now before the Court. The validity of the instant contracts, however, must obviously be judged on their present terms.

It should be remembered that Section 4 of the Act of July 2, 1956 incorporates the familiar Section 8 of the Reclamation Act of 1902, requiring respect for state water law.

process and invasion of their right to equal and non-discriminatory treatment. (AJS 27, 29-30, 32, 47, 48-49, 56, 59.) This protection stems from California water law, including Section 3 of Article XIV of the State Constitution, dealing with the use of state waters, and the relevant provisions of the State Water Code.

The present contract, as the court recognized, attempts to impose upon the Ivanhoe Irrigation District a discriminatory method of water distribution which has no relation whatsoever to the needs of the land or the beneficial use to which the water may be put, but is related solely to the identity of the owner of the land. Even apart from the requirements of the California statute law, it is impossible to say how such a discriminatory scheme could be reconciled with Article XIV, Section 3 of the California Constitution. That provision, as we have seen, requires that the water resources of California "be put to beneficial use to the fullest extent of which they are capable." The State Constitution looks to the land and the use it can make of the waters, and contains no exception based upon the identity of the landowner.

Where the people of California have desired to distribute state property with reference to the holdings of the distributee, they have shown themselves capable of saying so. Thus, Article XVII, Section 3 of the State Constitution provides that lands belonging to the state, which are suitable for cultivation, shall be granted to actual settlers "and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." The absence of any such limitation in the case of the constitutional provisions dealing with water is noteworthy and may not be disregarded.

The reliance placed by the court upon due process and equality of treatment was clearly grounded upon the proposition that the state law governing irrigation districts, if improperly construed to authorize the instant contracts, would collide with Article I, Sections 11 (uniformity of treatment) and 13 (due process) of the California Constitution, as the record references above cited demonstrate. (See particularly AJS 29-31, 47.) The court did not cite any federal cases, in this relation, and *City of Pasadena v. Stimson*, 91 Cal. 238, from which the court quoted on the equal protection point (AJS 47), does not cite any federal cases.[11]

Finally, in concluding this phase of the discussion, reference should be had to the disposition made by the court below of the contention that the validity of the contracts under California law was established, in some fashion, by the Second Validating Act of 1949, enacted by the California Legislature. After showing that this Act did not, and was not intended to, validate the instant contracts, the court continued (AJS 58-59):

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11. There are only two references anywhere in the opinion to the Federal Constitution. The first appears during the course of a discussion of riparian rights, not here in issue, simply in the phrase "protected from unlawful encroachment by both state and federal Constitutions." (AJS 27.) And the second, which is likewise preceded by a reference to the State Constitution, appears in a quoted passage from *Merchants Nat. Bank v. Escondido Irr. Dist.*, 144 Cal. 329, referring to "the protection of the provision of section 13 of article I of the State Constitution * * * that 'no person shall be * * * deprived of * * * property without due process of law,' and of the similar provision of Section 1 of the fourteenth Amendment to the constitution of the United States." (AJS 29-30.)

Where the state court of highest resort is ambiguous in its treatment of both federal and non-federal questions, and the state ground is adequate to support the judgment, this Court presumes that the decision below was based upon the non-federal ground. *Lynch v. New York*, 293 U.S. 52, 54-55; *New York v. Central Savings Bank*, 306 U.S. 661. Although available, this rule need not be invoked in the present instance because no such ambiguity exists.

"Furthermore if the contract be deemed to include a utility type contract at the option of the United States; the Second Validating Act of 1949, or any validating act of the character of the one here relied upon by the attorney general, could not render such a contract valid. It is well settled that the Legislature may ratify only what it could have theretofore authorized. It is obvious that the Legislature could not by a general ratifying statute breathe validity into a contract the effect of which would be to avoid *all of the laws of the state, both constitutional and statutory,* respecting the regulation and control of public utilities in this state * * * *In addition any validating act could not have confirmed the 160-acre limitation for the obvious reason that the Legislature could not have theretofore constitutionally authorized it.*" (Emphasis ours.)

The logic of the opinion returns us, then, to our starting point. The critical issue at stake is simply the validity of a contract to which a state-created agency is a party. The contract cannot be valid if one of the parties to it, the state agency, lacks the capacity to enter into it. The Ivanhoe Irrigation District lacks such capacity; the contract is invalid.

2. The Decisions in the Madera, Albonico and Santa Barbara Cases.

The *Madera* and *Santa Barbara* cases, like *Ivanhoe*, were contract validation proceedings. The contracts there involved, in the provisions presently relevant, were substantially the same as the Ivanhoe contract. (AJS 139, R. 185-*Madera;* AJS 211, 221; R. 477, 505, 537-*Santa Barbara.*) The contracts were held invalid on the grounds set forth in *Ivanhoe,* the court making express references to its decision in that case. (AJS 145-*Madera;* AJS 221-*Santa Bar-*

bara.) As in *Ivanhoe*, in both *Madera* and *Santa Barbara* challenges were also made as to the sufficiency of certain proceedings leading to the execution of the contracts and the adequacy of the notices of election for their confirmation. And as in *Ivanhoe* the court in both cases found it unnecessary to decide these questions, on the ground that, the contracts having been found invalid in view of their substantive provisions, upon the submission of any further proposed contracts the alleged defects need not recur. (AJS 153-154-*Madera*; AJS 222-*Santa Barbara*.)

In their struggle to maintain that the cases were decided on federal rather than state grounds, appellants (1) point to the fact that all four cases were decided on a common basis, and then (2) argue that "a common state ground" does not extend to the *Santa Barbara* case. This is so, according to appellants, because Section 22250 of the California Water Code, although applying to all irrigation districts, does not in terms apply to the Santa Barbara County Water Agency, which was organized under a separate statute, or its member units. Section 22250 of the Water Code, *supra*, p. 33, is the provision which requires that water distributed by districts be apportioned ratably to each landowner. (App. Br., pp. 29-30.)

The Supreme Court of California failed to perceive any such distinction between the *Santa Barbara* and the other three cases, and we submit that none exists. Section 22250 of the State Water Code, like Section 22252, which forbids discrimination when water is delivered on the basis of toll charges, expresses a state policy now grounded in Section 3, Article XIV of the California Constitution. State waters shall be put to beneficial use to the fullest extent to which they are capable, without discrimination on the basis of the identity of the landowner. Indeed, as we have seen

(*supra*, p. 43); the Court held in the *Ivanhoe* case that a state statute which purported to permit such discrimination would collide with Article I, Sections 11 and 13 of the California Constitution. Appellants' far-fetched distinction ignores this holding.

The *Albonico* case, as we have seen, *supra*, p. 11, is a proceeding for a writ of mandate to compel the Madera Irrigation District to vacate its action denying exclusion from the district of the Albonicos' land in excess of 320 acres. The trial court entered a judgment in the alternative requiring either that the Albonicos' land in excess of 320 acres be supplied with water by the district or that the land be excluded. The Supreme Court of California held that the district may not deny the Albonicos' land in excess of 320 acres its fair and ratable portion of the water to be distributed. The court therefore modified the judgment by striking therefrom the alternative under which the land might be excluded and, as so modified, affirmed the judgment. (AJS 183.)

In the *Albonico* case the court rested its determination on the *Ivanhoe* and *Madera* cases. In summarizing those cases in the *Albonico* decision, the Supreme Court of California effectively disposed of appellants' contention (Br., pp. 28-42) that its decisions in the *Ivanhoe* and *Madera* cases involve the *capacity of the United States* to enter into the contracts here in question. As we have previously pointed out, the court's decisions in these cases were determinative of the *capacity of the irrigation districts* to enter into the contracts in question. The court stated in *Albonico* (AJS 183):

> "In view of our decisions in *Ivanhoe Irr. Dist. v. All Parties, ante*, p. ..... (..... P. 2d .....), and in *Madera Irr. Dist. v. All Persons, ante*, p. ..... (..... P. 2d .....), where-

in it was held that excess land provisions in similar contracts were improperly included therein, it must be concluded in this proceeding that *the district* may not impose on landowners within the district the land limitations contained in sections 28, 29 and 30 of the contract in question, and that all of the petitioners' lands within the district are entitled to their fair, ratable portion of the water distributed and to be distributed *by the district* for irrigation purposes. (Wat. Code, Sec. 22250.) As the petitioners' lands will thus be [700] benefited by the lawful operations of the district under a proper contract for a supply of water to the district a writ of mandate to compel the exclusion thereof from the district is inappropriate and unnecessary. (Wat. Code Secs. 26728, 26729.)" (Emphasis ours.).

C. CONCLUSION AS TO THE DECISIONS BELOW.

In the present litigation the United States is attempting to proceed by contract with public agencies which are creatures of the State of California. No regulatory or coercive power of the Federal Government is asserted. A valid contract necessarily requires two contracting parties with capacity to make it. The highest court of the state has held that one of the parties to the contracts, namely the respective state agency, lacks such power and, under the California Constitution, could not be granted such power by the L slature. Under the decisions of this Court which have been cited, theretofore, no substantial federal question is presented sufficient to support either the appeals or writs of certiorari.

No action of this Court can provide California irrigation districts with powers which they lack. An opinion of this Court, in the words of *Flournoy v. Wiener*, 321 U. S. 253, 261-262, would "be advisory only, since there is nothing

before" the Court on which it can "render a decision which would have any controlling effect on the rights of the parties."

II. Federal Law Leaves to State Jurisdiction the Capacity of Irrigation Districts to Contract and the Control, Appropriation, Use and Distribution of Water for Irrigation Purposes.

For the reasons set forth under Point I, we maintain that no substantial federal question is presented, that the decisions below rest on adequate non-federal grounds, and that the appeals should be dismissed and certiorari denied. Reserving our position as to this, we proceed, without repeating this reservation, to a consideration of the cases on the assumption that a substantial federal question is involved. We submit, on this assumption, that analysis demonstrates that the federal law itself leaves the pertinent subject matter within state jurisdiction. That is, the federal law itself refers us back to state law.

A. THE FEDERAL STATUTES INVOLVED.

The provisions of the instant contracts are claimed to be authorized and required so far as the Federal Government is concerned by Section 46 of what is known as the Omnibus Adjustment Act of 1926, 44 Stat. 636, 43 U.S.C. 423e, and Section 9(c), (d) and (e) of the Reclamation Project Act of 1939, 53 Stat. 1187, as amended, 43 U.S.C. 485h(c), (d) and (e). The key language, for purposes of the present discussion, is to be found in Section 46 of the 1926 Act, as follows:

> "No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irri-

gation district or irrigation districts *organized under State law * * * and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction.*" (Emphasis ours.)

The foregoing provisions are considered to be amendatory of or supplementary to the original Reclamation Act of 1902, 32 Stat. 388; both the Central Valley Project and the Cachuma Project are considered to be reclamation projects. (App. Br., p. 43.) A second critical starting point in the consideration of these cases is, therefore, Section 8 of the 1902 Act, now codified at 43 U.S.C. 372, 383, providing:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and the beneficial use shall be the basis, the measure, and the limit of the right."

It is important to note that Section 8, above quoted, is but one of a whole series of consistent congressional enactments dealing with water for irrigation purposes which have both preceded and followed the Reclamation Act of 1902. These include, prior to 1902, the Acts of 1866 and 1870, now 43 U.S.C. 661, and the Desert Land Act, of 1877, now 43 U.S.C. 321. In recent years this series of enactments is exemplified

by the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1311, which, Section 3, reconfirmed state jurisdiction with respect to inland waters; and the Act of July 2, 1956, 70 Stat. 483, 43 U.S.C. 485h-1-5, *which in its Section 4 incorporated verbatim Section 8 of the Reclamation Act of 1902, above quoted, admonishing respect for state water law.*

Note should also be made of Section 208(a), (b) and (c) of the Appropriation Act of July 10, 1952, 66 Stat. 549, 43 U.S.C. 666, which, as to any case in which the United States is joined as a defendant involving the adjudication or administration of state water rights, provides that the United States shall "be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty."

The effect of all of the enactments above referred to has been to confirm the state's authority to deal under state law with the control, appropriation, use and distribution of water for irrigation purposes, subject only to the navigational servitude. The navigational servitude is not involved in this litigation.

B. CONGRESS HAS NOT SOUGHT TO IMPOSE TERMS AND CONDITIONS EXCEPT TO THE EXTENT THAT THEY MAY BE VALIDLY ACCEPTED BY STATE IRRIGATION DISTRICTS IN ACCORDANCE WITH STATE LAW.

From the foregoing, it will be seen at once that what is here involved is simply the validity of purported contracts entered into by the United States, acting by the Bureau of Reclamation, and certain irrigation districts "organized," as Section 46 of the 1926 Act, above quoted, expressly contemplates, "under State law." It is well established that when the United States enters into a contract, its construction is governed by the principles of general contract law. Such contract principles would seem to apply in the present

cases, a *fortiori*, because what is here involved is not even the construction or administration of a contract but the question of its *validity* at the outset. The decisive fact is that one of the contracting parties is organized, precisely as Congress contemplated, not under federal but under state law; and general contract law, as Congress intended, requires that the capacity of a district to enter into a particular contract be tested by the law under which it was organized and exists.

Accordingly, whether or not the question of the validity of these contracts can be said in one sense or another to present a federal question, it seems evident, from the provisions of the statute and general principles of contract law, that the question of the capacity of the state agency to contract will necessarily be resolved by reference to the law of the state. That is, federal law, even if it applies, will import state law in order to test the capacity of one of the contracting parties, the state-created agency.

The action in fact taken by the Bureau of Reclamation under Section 46 of the 1926 Act accords with this analysis. Each of the master contracts in issue provides in substance that the contracting irrigation district shall—

> "file and prosecute to a final decree, *including any appeal therefrom to the highest court of the State of California*, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation" of the contract. (Ivanhoe, R. 41-42; Madera, R. 218; Santa Barbara, R. 504.) (Emphasis ours.)[12]

12. The wording of this provision of the Santa Barbara contract varies slightly from the corresponding provisions of the Ivanhoe and Madera contracts, from which the above quotation is taken, but the sense is the same.

It will be noted that the Bureau of Reclamation, by this provision, has interpreted Section 46 of the 1926 Act to require a testing of the validity of the contract in the state courts, under state procedures,[13] and, the inference seems inescapable, under state law. No federal statute provides procedures for the validation of such contracts, and the contracting districts are established, as we have seen, not under any federal law but under such law as the state has chosen to provide.

Similarly, the Ivanhoe contract further provides that it shall not become binding until it has been "confirmed by a court of competent jurisdiction or pending appellate action if *ground* for appeal be laid." (R. 42.) Consistent with the statute, this provision reflects the sense of all of the contracts.

The subject of the contracts—the delivery of water for irrigation—likewise is a matter which Congress has insistently reserved to the jurisdiction of the states, as we have seen from a reference to the controlling statutes, above. And the Bureau of Reclamation has purported to recognize the overriding force of Section 8 of the Reclamation Act. It has publicly stated with reference to the Central Valley Project:

> "The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation

13. The Madera contract (R. 218) makes express reference to the validation procedure set out in the California Water Code.

> and the Secretary of the Interior have consistently, through the 42 years since the 1902 act, been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws." Quoted in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 740-741, fn. 15.

Similarly, the Secretary of the Interior has reported to Congress:

> "In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure. This basin report on the Central Valley is predicated on such a policy." Report of Regional Director, Region II, Bureau of Reclamation, Dec. 1, 1947, approved by the Secretary of the Interior, July 29, 1948, S. Doc. No. 113, 81st Cong., Ist Sess. 39. Quoted in *United States v. Gerlach Live Stock Co.*, 339 U.S. at p. 740, fn. 14.

At the date of the filing of this brief, the Court may judicially notice that a proceeding is pending at Fresno, California, before the California State Water Rights Board, in which the Bureau of Reclamation is attempting to acquire appropriation rights *under state law* to water to be delivered by means of the Central Valley Project.[14]

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14. *In the matter of Applications 23, 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822, 9369, UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, Applicant*, pending before the State of California—State Water Rights Board. And see *supra*, p. 20, as to prior proceedings of this character.

C. THE DECISIONS OF THIS COURT CONFIRM THAT IT IS THE CONGRESSIONAL POLICY TO LEAVE IRRIGATION MATTERS WITHIN STATE JURISDICTION.

Numerous decisions of this Court may be cited for the proposition that, unless Congress has provided a different standard (as it has not in the present cases), the construction of a contract to which the United States is a party is governed by the principles of general contract law. *E.g., United States v. Standard Rice Co.*, 323 U.S. 106; *Priebe & Sons v. United States*, 332 U.S. 407. Under such principles of general contract law, needless to say, a purported contract is not valid if one of the parties lacks capacity to enter into it. American Law Institute, Restatement of the Law of Contracts, Section 18. The same principles require that the capacity of a juristic person to enter into a particular contract be determined in the first instance by the law of its creation, in this case, as we have seen, the law of California. *E.g.*, American Law Institute, Restatement of the Law of Conflict of Laws, Section 165.

An illustrative case, which we believe correctly applied principles decisive of the present litigation, is *Alameda County v. United States*, 124 F. 2d 611 (9th Cir.). There a contract was involved between the United States and Alameda County under which the latter had agreed to maintain, operate and replace a certain bridge. The state district court of appeal (the Supreme Court of California thereafter denied hearing) held the contract void because it lacked mutuality and exceeded the powers of the county under the State Constitution. The United States then brought suit for specific performance in the federal district court, basing its claims on the federal constitutional power over navigable waters and a Congressional Act of 1910. Sus-

taining the position of the County, as appellant from the district court, the court of appeals pointed out that—

> "The alleged rights sought to be enforced here, are not rights to control navigable waters, but alleged rights to compel operation, maintenance and replacement of a bridge by appellant. Such alleged rights stem not from a constitutional provision, because nothing in the constitution purports to affirm that appellant must operate any bridge, but arise from a contract alleged to have been entered into between appellant and appellee. Any obligation of appellant to operate, maintain and replace the bridge in question is found in the alleged contract, and not in a constitutional provision." 124 F. 2d at p. 616.

Similarly, the court noted that the 1910 statute simply authorized the Secretary of War to enter into contracts concerning various bridges on prescribed terms, but did "not purport to impose any obligation upon appellant" or "to confer on appellant any power whatever." "Likewise, there is nothing in the statute which purports to validate a contract in advance." 124 F. 2d at p. 616. The court therefore held that the power of the county to enter into the contract was governed exclusively by state law, as declared by the California courts in the prior litigation. The court of appeals directed the trial court to enter a decree determining the contract null and void. The Government filed no petition for certiorari.

The application of the principles applied in this case to the present litigation seems unmistakable. Various acts of Congress prescribe terms to be included in contracts with state irrigation districts. They do not purport, however, to require the districts to enter into such contracts, to impose any obligations upon them, to grant them any powers, or to validate such contracts in advance. These matters are

left to state law; and indeed the Secretary of the Interior and the Bureau of Reclamation are directed to conform such contracts to state law. The instant contracts cannot be held valid unless state law gives them validity.

Equally or more significant are the numerous decisions of this Court dealing with the control, appropriation, use and distribution of water for irrigation purposes (from both navigable and non-navigable streams) which confirm the authority of the states with respect to such waters for such purposes.

Mason Co. v Tax Comm'n., 302 U.S. 186, presented the question whether the United States in acquiring ownership had also obtained exclusive jurisdiction over lands within the State of Washington used in connection with the building of the Grand Coulee Dam on the Columbia River. Answering the question in the negative, the Court, speaking by Chief Justice Hughes, noted that in acquiring such lands the United States proceeded under the Reclamation Act of 1902 and continued (302 U.S. at p. 199):

> "That Act was not intended to provide for the acquisition of exclusive federal jurisdiction. The Act itself stated the contrary (§8, 43 U.S.C. 383). It directed the Secretary of the Interior to proceed in conformity with the state laws in carrying out the provisions of the Act and provided that nothing therein contained should be construed as interfering with the laws of the State relating to the control, appropriation, use or distribution of water used in irrigation. The Act has been administered in harmony with this controlling principle that the State should not be ousted of jurisdiction. See *Kansas v. Colorado*, 206 U.S. 46, 92, 93; *Nebraska*

v. Wyoming, 295 U.S. 40, 42; *California Oregon Power Co. v. Beaver Cement Co.*, 295 U.S. 142, 164."[15]

Of the three cases cited by Chief Justice Hughes, *Kansas v. Colorado*, a landmark case in this field, will be considered *infra*, under Point III, and the remaining two cases will be considered at the appropriate points under the present topic.

In *California-Oregon Power Co. v. Beaver Cement Co.*, 295 U.S. 142, the last of the cases above cited, the question was whether Oregon by statute could change the law of riparian rights to the detriment of a grantee of the United States. The case is of particular significance because the Court carefully reviewed the Acts of 1866, 1870 and the Desert Land Act, of 1877 (295 U.S. at pp. 154-158), and confirmed its conclusions as to the force of these laws by a reference to Section 8 of the Reclamation Act of 1902 (295 at p. 164, fn. 2). Sustaining the Oregon legislation, the Court observed (p. 162):

> "If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted."

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15. The Court also observed (302 U.S. at p. 206):

> "* * * irrigation—'the reclamation of arid and semi-arid lands'—is an integral part of the federal plan and the reservoirs for the storage of water were to be provided with that end in view. That was set forth as one of the main objectives, as well as the development of power, in the Declaration of Taking filed in the federal court in the condemnation proceedings, and whatever may be said of power development so far as it is incidental to the improvement of navigation, *the reclamation of arid or semi-arid lands has always been regarded as a project which carried with it an appropriate recognition of a continued state jurisdiction. Kansas v. Colorado, supra; Nebraska v. Wyoming, supra.*" (Emphasis ours.)

In *Ickes v. Fox*, 85 F. 2d 294, 298 (D.C. Cir.), the court held:

> "Under the Reclamation Act the United States, in putting in an irrigation enterprise, stands in the same position with relation to the state as a private individual. The waters belong to the state, and the United States never acquires any title therein any more than a private appropriator."

Affirming the decision below in this case, 300 U.S. 82, this Court stated (pp. 94-95):

> "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr*, 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (ibid.), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works."

Exemplifying this solid line of authority, *Nebraska v. Wyoming*, 295 U.S. 40, another of the cases cited by Chief Justice Hughes, involved the equitable apportionment of certain waters. The Court, in considering a motion of the defendant to dismiss the bill, concluded (p. 43):

> "2. The motion asserts that the Secretary of the Interior is an indispensable party. *The bill alleges, and we know as a matter of law,*[3] *that the Secretary and his*

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[3] "Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390; U.S.C. Tit. 43, § 383."

agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party." (Emphasis ours.)

Thereafter, the United States intervened in this litigation (304 U.S. 545). In disposing of the controversy and rejecting the claim of the United States to certain unappropriated water, the Court quoted Section 8 of the Reclamation Act of 1902 (325 U.S. 589, 612-613). After reviewing the history of the waters in dispute the Court continued (pp. 613-614):

"All of these steps make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act."

The Court then quoted the passage from its decision in *Ickes v. Fox* which we have quoted above, concluding that the Government was "simply a carrier and distributor of the water," with the right to receive "the sums stipulated in the contracts as reimbursement for" costs and charges.

Reference should also be made to *Port of Seattle v. Oregon & W.R.R.*, 255 U.S. 56, 63:

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same."

And the decision in *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252, so far as presently significant, is reflected in the following (p. 252):

> "Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law."

Finally, the important case of *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, dealt with the impact of Section 8 upon the Central Valley Project, of California. The Court held, rejecting the Government's argument, that the owners of so-called uncontrolled grass lands along the San Joaquin River were entitled to compensation for the drying up of such lands resulting, paradoxically, from the construction by the United States of the Friant Dam and dependent irrigation system. In reaching this conclusion the Court reasoned that whether "Congress could have chosen to take" the land owners' "rights by the exercise of its dominant navigation servitude", without compensation, "is immaterial," since Congress in fact had directed the Secretary of the Interior to proceed under the Reclamation Act of 1902. And by this direction, the Court observed, "Congress elected not 'to in any way interfere with the laws of any State * * * relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder,'" citing Section 8 of the 1902 Act. 339 U.S. at p. 739.

The Court therefore turned, "as that Act bids us, to the laws of the State to determine the rights and liabilities of landowner and appropriator." 339 U.S. at p. 742. Analyzing the 1928 amendment to the California Constitution, Article XIV, Section 3, discussed *infra*, the Court referred to it as "California's basic water law, to which the Federal Rec-

lamation Act defers." 339 U.S. at p. 751. Because claimants' rights were protected under state law, compensation by the Federal Government was required for the damage done them.

Another portion of the *Gerlach* opinion discussed the constitutional power basic to such irrigation undertakings as that of the Central Valley Project. This, however, anticipates Point III of our argument. At this point we summarize:

Congress has chosen, as the decisions of this Court confirm, to leave to state law the capacity of irrigation districts to contract, and the control, appropriation, use and distribution of water for irrigation purposes. Therefore, if the instant contracts are unauthorized by California law, that is the end of the matter and the judgments below should be affirmed.

D. APPELLANTS' CONTENTIONS, IF ADOPTED, WOULD GIVE NO FORCE OR EFFECT TO SECTION 8 OF THE RECLAMATION ACT.

Appellants refer to only three of the cases reviewed under C, above. In what would appear to be a studied disregard of the force of all of these cases, appellants now for the first time in this litigation even *deny* the continuing vitality of Section 8 of the Reclamation Act. See *supra*, p. 28. Attempt is made to discredit the decisions below because

> "In effect, the California Supreme Court's holding is that section 8 compels the United States to give *specific* recognition to water rights established under state law * * *." (App. Br., pp. 58-59.)

We agree that the Supreme Court of California did so hold; but we submit that its holding in this regard, under the authorities cited in C, above, is so plainly correct, even had it been necessary to the decision, as not even to raise a

substantial federal question. The issue between us could not be more sharply drawn.

Appellants' argument in this regard seems to be that Section 8 is superseded by "other and later federal enactments", referring to statutory provisions permitting the United States to acquire property, including water rights, by purchase or condemnation. (App. Br., p. 59.) Appellants implicitly admit at this point that the instant contracts cannot be held valid if Section 8 means what is says and what this Court has uniformly said that it means. That is, appellants implicitly admit that the United States, *pursuant to California law,* cannot obtain the "unlimited title" (in appellants' language) necessary to make effective various provisions of the contracts. Hence, to appellants the condemnation provisions are of great importance. These, they claim, enable the United States to secure that "unlimited title" in the water to be delivered which is essential to the validity of the contracts. (App. Br., pp. 57 61.)

Appellants misconceive the extent of the powers of acquisition and condemnation granted by Congress. The most obvious source of such powers is to be found in Section 7 of the original Reclamation Act. This section provides that "in carrying out the provisions of this act" the United States shall have power to purchase and condemn. Plainly, this section is to be reconciled with Section 8. Section 7 is not an end in itself but a means to an end, and the end is to be found in other statutory provisions, including Section 8. Section 7 and the later provisions relating to eminent domain are given full effect when read to mean *that the United States may secure the title permitted by state law, no more and no less.* A title so limited is precisely the title required to give effect to Section 8.

Similarly, other federal statutory provisions fall into a consistent pattern when the necessity is recognized of reconciling them with Section 8. Various terms are prescribed for inclusion in contracts with irrigation districts, but only to the extent permitted by state law. Section 8 is a direction to the Secretary of the Interior and the Bureau of Reclamation in carrying out the purposes of the Reclamation Act to conform such contracts to state requirements.

It should also be noted, as a second answer to appellants' position, that even if, contrary to fact and the Congressional plan, the United States could secure an "unlimited title" in California waters for irrigation purposes, this would not serve to validate the contracts. That is, "unlimited title" is essential if the contracts are to be held valid; but "unlimited title", without more, is not sufficient to validate them. The reason is that the United States is not disposing of the water directly to the users, but has elected to proceed by contracting with state agencies known as irrigation districts, and to require them by contract to assume certain obligations and impose certain restrictions upon their members. However "unlimited" the title of the United States to the waters, such contracts cannot stand unless the state agencies have authority from the state to enter ino them.

In view of the foregoing line of argument, necessarily resorted to by appellants in their endeavor to sustain the validity of the contracts, it may be helpful to consider the constitutional authority for irrigation projects such as those here involved. The critical question, of course, is not how Congress might have proceeded but how Congress in fact did elect to proceed. Here, as we have emphasized, Congress decided to proceed by way of contract, with full recognition accorded to state jurisdiction over waters for

irrigation purposes. However, in view of the disagreement between the parties as to what the federal law means and as to the overriding force of Section 8, the constitutional bases upon which Congress proceeded may be important in throwing additional light on what it actually has done. To this we now turn.

III. The Available Federal Constitutional Powers Are Ineffective to Require Validation of the Contracts by Force of Federal Law.

A. THE CONGRESSIONAL POWER TO LEGISLATE IN CONNECTION WITH THE CENTRAL VALLEY PROJECT AND THE CACHUMA UNIT IS UNDER THE WELFARE CLAUSE OF THE FEDERAL CONSTITUTION.

United States v. Gerlach Live Stock Co., supra., held that ambiguous congressional declarations concerning the status of the Central Valley Project as an exercise of the federal power over navigation were insufficient to deny compensation to the injured landowner. The Court declared:

> "* * * we need not ponder whether, by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it, and we need not here pass on any question of constitutional power; for we do not find that Congress has attempted to take or authorized the taking, without compensation, of any rights valid under state law." 339 U.S. at p. 737.

The opinion comments that the "custom of invoking the navigation power in authorizing improvements appears to have had its origin when the power of the Central Government to make internal improvements was contested and in doubt." The Court then continued with this significant passage:

"It was not until 1936 that this Court in *United States v. Butler*, 297 U.S. 1, declared for the first time, and without dissent on this point, that, in conferring power upon Congress to tax 'to pay the Debts and provide for the common Defence and general Welfare of the United States,' the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them, and that Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. If any doubt of this power remained, it was laid to rest the following year in *Helvering v. Davis*, 301 U.S. 619, 640. Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation.[10]" 339 U.S. p. 738.

"[10]See Feasibility Report, Secretary of the Interior Ickes to President Roosevelt, Nov. 26, 1935, recommending 'the approval of the Central Valley development as a Federal reclamation project,' and pointing out that the area is served by excellent transportation facilities, that much of its produce is shipped to eastern markets, and that if decreasing productivity as a result of acute shortage of water for irrigation needs were to continue, 'a share of the loss will be suffered by persons not residing in the areas directly affected.'"

The historic case of *Kansas v. Colorado*, 206 U.S. 46, supports the reasoning of the *Gerlach* case to the effect that the enumeration of the powers granted to Congress by Article I, Section 8 of the Constitution (apart from the taxing and spending power contained in the first paragraph thereof) does not include irrigation and the reclamation of

arid lands, and that such federal authority as exists in this regard must be found in Article IV, Section 3, of the Constitution, relating to the authority of the United States with respect to its own property (and, as shown by the *Gerlach* case, in the taxing and spending power).

In this case Kansas sued Colorado to restrain the diversion of waters of the Arkansas River within Colorado. The Federal Government attempted to intervene in the case, although it was not contended that any appropriation of water either by Kansas or Colorado affected the navigability of the Arkansas River. The federal claim was based, instead, on the large area of public lands within the watershed of the Arkansas River, and the federal interest in irrigation as manifested by the Reclamation Act. Reliance was placed, not upon any of the expressly enumerated powers granted the Federal Government, but upon "the doctrine of inherent sovereignty and of implied powers," upon "powers that are not expressly given nor ancillary to any single enumerated power, but which are resulting powers arising from the aggregate powers of the Government."[16] The Court was exhorted to lay down and apply to both states the "proper rule" as to the use of waters for irrigation, "outside of the law of either State," and "*within the maxim salus populi est suprema lex.*"[17]

In a fully reasoned opinion, the Court rejected the Federal Government's contentions, analyzing the matter as follows:

The Federal Government's argument involved "the question," said the Court, "whether the reclamation of arid lands is one of the powers granted to the General Govern-

16. 206 U.S. 46, 67. The argument for the Federal Government is summarized at pp. 64-76.

17. 206 U.S. at p. 75.

ment." (206 U.S. at p. 87.) As to this the Court answered (206 U.S. at pp. 87-88.):

> "Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands."

Then taking up the power of the Federal Government to care for and dispose of its own property, under Article IV, Section 3 of the Constitution, the Court recognized the federal authority in this regard but held (206 U.S. at p. 92):

> "We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

The federal petition in intervention was denied.

Similarly, it is to be noted (*supra*, p. 56, fn. 15) that Chief Justice Hughes in the *Mason* case regarded the reclamation of arid or semi-arid lands as something set apart from navigation and matters incidental to it. Thus, the *Mason* opinion commented that "whatever may be said of power development so far as it is incidental to the improvement of navigation, the reclamation of arid or semi-arid lands has always been regarded as a project which carried with it an appropriate recognition of a continued state jurisdiction." 302 U.S. at p. 206.

B. THE POWER OF CONGRESS TO ACT UNDER THE WELFARE CLAUSE IS LIMITED.

Concluding, then, that with respect to a particular irrigation project, such as either of the two involved in the present case, Congress constitutionally may not, or has deliberately elected not to, invoke "a highly fictional navigational purpose," what consequences follow? One consequence, as we have seen, is that the project has constitutional basis only in the power of Congress to tax and appropriate for the general welfare, as provided by the first paragraph of Article I, Section 8 (and possibly also in the property-disposing power, as provided by Article IV, Section 3). A second consequence must be answered with reference to the nature of the taxing-spending-general welfare and property-disposing powers. May the Federal Government, although limited to these powers, secure an "unlimited title", contrary to the law of the state, to so much of the property within a state as may be necessary to achieve some purpose believed to be related to the general welfare, and then proceed to use and dispose of the property so acquired in defiance of local law? Appellants answer this question in the affirmative, as they must if the contracts are to be held valid. We submit that a negative answer is required, else the taxing-spending and property-disposing powers are converted into authority for the Federal Government to engage in any enterprise it pleases, within the scope of the general welfare, unlimited by the powers delegated to it and in contravention of state law.

If appellants are right, then it is foolish any longer to speak of our Federal Government as one of delegated powers, with all remaining authority reserved to the states; for, if appellants are right, the Federal Government may exercise a power of eminent domain over whatever property

interest it chooses, within the scope of the "general welfare", and may then dispose of such property on federal terms, without regard to and in defiance of the law of the state. If this is now the law, who can doubt that that unique American contribution to political science—federalism—is gone forever? If we are right, on the other hand, then Congress, under the only constitutional powers available to it, may not override state law in any sense now relevant. Congress is bound to honor state law as applied to the capacity of a state agent to contract and to state jurisdiction over its waters for irrigation purposes.

The foregoing analysis also answers the argument of appellants (Br., pp. 22, 60) that the United States must be deemed to have taken, unwittingly, all property rights of the landowners inconsistent with the contract provisions, and that the landowners are remitted to their remedy of compensation. The argument is, of course, highly contrived. But even if the United States had acquired all the property rights of the landowners, it would nevertheless hold them subject to the restrictions on title and use imposed by state law. The United States could not acquire or exercise property rights free of these restrictions, so long as the property rights were obtained solely to carry out the powers granted by the general welfare clause.[18]

We submit that the prior decisions of the Court unquestionably support the proposition that the taxing-spending and property-disposing powers of the Federal Government do not permit it to override state law in any sense pertinent to the present cases. These powers, unlike the specifically-

18. The case of *United States v. Carmack*, 329 U.S. 230, cited by appellants, is inapposite. There the United States was acquiring land for a post office and customs house, under the postal and commerce powers, and not for a use depending solely on the general welfare clause.

enumerated powers, do not carry with them authority to regulate, coerce and override.

As to the spending power, it was debated for 125 years whether the Madisonian or the Hamiltonian view was correct. Madison believed that the power to provide for the general welfare was limited to expenditures in aid of the expressly-enumerated powers given the Federal Government. Hamilton, to the contrary, contended that the spending power was not so restricted, but was a substantive power, limited only by the purpose to provide for the general welfare of the nation. The Hamiltonian view finally triumphed in *United States v. Butler*, 297 U.S. 1; but the Court there also declared the corollary that the spending power could not be so used as to extend the Federal powers of regulation and coercion beyond those enumerated in the Constitution to the point where they interfered with the powers of the states, 297 U.S. at pp. 72-75. Such a corollary was obviously essential, since otherwise a virtually unlimited spending power could be used to obliterate state authority with respect to those matters not delegated to the Federal Government and therefore, under the Tenth Amendment, constitutionally reserved to the States.

Although there was a difference of opinion in the Court as to the ultimate decision in the *Butler* case, there was no difference as to this fundamental limitation on the spending power.

That case involved a short-term contract between the Federal Government and an individual farmer, by which in return for benefit payments the farmer agreed to limit production. The contract was perfectly valid under state law and no contention to the contrary was made. The Court took as its starting point the fundamental that (297 U. S. at p. 73):

> "An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution."

With this proposition, which is so highly relevant to the present case, the dissenting justices were in accord. They explicitly recognized that the spending power (297 U. S. at p. 87):

> "may not be used to coerce action left to state control."

The point of division in the case was whether the contract there involved, since it was consistent with and did not override state law, nevertheless provided a mask for the exercise by the Federal Government of regulatory and coercive powers. The Court believed that it did and held the contract invalid; a minority of three justices believed that it did not. That the spending power could not be used to override state law or to displace the power of the state legislature was accepted as fundamental by the whole Court.

And the same corollary limiting the use of the spending power necessarily attaches to the power to administer and dispose of "property belonging to the United States" under Article IV, Section 3 of the Federal Constitution, referred to above. Patently, the Federal Government cannot attach to the use or disposition of its property a condition or contractual requirement which will have the effect of overriding the law of a state or displacing its legislative power in a field constitutionally reserved to the states. Speaking of the Government's sale of surplus energy generated at Wilson Dam, Chief Justice Hughes in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 338 took as a basic assumption that the method employed in disposing of the Government's own property must:

"* * * be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States."[19]

The opinion then cites *Kansas v. Colorado, supra.*

A case outside of the subject of irrigation which illumines this field of law is *Hopkins Savings Assn. v. Cleary,* 296 U. S. 315 (opinion by Mr. Justice Cardozo for a unanimous Court). The Home Owners' Loan Act of 1933, as amended, purported to permit certain building and loan associations organized exclusively under state law to convert themselves, without state consent, into federal savings and loan associations. Petitioners were two associations incorporated under and subject to the control of Wisconsin law, which did not permit any such transmutation. Petitioners nevertheless attempted so to convert themselves and the State Banking Commission interfered. The overriding of state law here attempted was defended by the Solicitor General on the ground, among others, that the Federal Act amounted to a lawful exercise of the power of Congress to levy taxes and "spend the proceeds to promote the general welfare of the United States * * *" 296 U. S. at p. 326.

Deciding for the state and holding the Federal Statute unconstitutional as so applied, the Court pointed out that such an invasion of state law could only be justified, if at all (296 U. S. at p. 338):

"* * * in situations where the central government is at liberty (as it is under the commerce clause when such a

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19. Although three opinions were written in the *Ashwander* case, the Court here also was unanimous as to the fundamental limitation on federal power referred to by the Chief Justice. Four justices, concurring, believed the case not properly before the Court, but nevertheless indicated their agreement with the conclusions reached on the constitutional issues (297 U.S. at p. 341). And Mr. Justice McReynolds, dissenting, must have agreed with the limitation on federal power stated by the Chief Justice.

purpose is disclosed) to exercise a power that is exclusive as well as paramount."

Not being an exercise of such exclusive and paramount power, the instant statute could not stand.[20]

Oklahoma v. Civil Service Comm'n., 330 U. S. 127, involved federal grants to Oklahoma for highway construction purposes, conditional in part upon abstentation by the members of the State Highway Commission from an active part in political management or political campaigns. A member of the State Commission nevertheless indulged in such activity, and the United States Civil Service Commission thereupon notified Oklahoma that his removal was "warranted." The condition here imposed did not attempt to override any law of Oklahoma, and the end sought by Congress in imposing the condition was the legitimate and justifiable one of assuring "better public service by requiring those who administer funds for national needs to abstain from active political partisanship" (330 U. S. at p. 143). Moreover, Oklahoma had not legally bound herself—by a contract of 40 years' duration or otherwise—to remove the office holder, and in fact refused to do so. "Oklahoma," the Court pointed out (pp. 143-144), "adopted the 'simple expedient' of not yielding to what she urges is federal coercion." The consequence to Oklahoma of this refusal was simply that federal highway grants would be withheld in an amount equal to two years' compensation of the erring State Commissioner (330 U. S. at p. 133). It was on these narrow facts that the condition was sustained.

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20. And see *Perkins v. Lukens Steel Co.*, 310 U.S. 113, where the Court likened the Government's purchasing power to that of "private individuals and business" (p. 127), and held that the Federal Act there involved did "not present an exercise by Congress of regulatory power over private business or employment" (p. 128).

Similarly, as the Court has made clear from its opinions in other leading cases in this field, the conditions attaching to federal grants which have been sustained have not attempted to override or supersede state law or to tie the hands of the state legislature for any extended period, or at all. *Steward Machine Co. v. Davis*, 301 U. S. 548 (Federal Unemployment Compensation system; no conflict with state law; state free to withdraw at any time); *United States v. San Francisco*, 310 U. S. 16 (federal grant to city on condition subsequent; no conflict with state law; city must comply with condition *or* surrender grant, 310 U. S. at p. 19). And see *United States v. Bekins*, 304 U. S. 27 (revocable consent by state to permit federal law to apply in bankruptcy, where state lacked legislative authority).

Finally, *United States v. Burnison*, 339 U. S. 87, is suggestive of the present problem. There the United States appealed a decision of the Supreme Court of California which held that the state probate code did not authorize testamentary gifts to the United States. This Court did not doubt "that the receipt of gifts, testamentary and non-testamentary, is within the ambit of federal powers." 339 U.S. at p. 90. From this starting point, however, the Government made an argument similar to that outlined by the Solicitor General in his jurisdictional memorandum filed in June, 1957 in the present cases. The Government in *Burneson* argued, *inter alia*, that the California law, as interpreted, violated the supremacy clause of Article VI of the Federal Constitution. The major premise of its syllogism was that a state may not interpose an obstacle to the effective operation of a federal constitutional power. The minor premise was that every authorized activity of the United States necessarily represents the exercise of a federal constitutional power, and that by hypothesis this must be so

of the federal authority to receive testamentary gifts. And the conclusion, so it was argued, followed that a state could not permit its probate law to do other than authorize gifts to the United States. 339 U. S. at p. 91.

Although individual cases appeared to lend support to each link in the foregoing argument, this Court pointed out that the Government failed to analyze correctly the nature both of the federal power involved and the state power asserted. "This argument," said the Court, "fails to recognize that the state acts upon the power of its domiciliary to give and not on the United States' power to receive." 339 U. S. at p. 91. The decision of the Supreme Court of California was affirmed.

By parity of reasoning, it seems clear that in the present cases the state's authority is brought to bear upon the contracting authority of the state-created irrigation agencies, not that of the Federal Government. The contracts are invalid, not because the court below held the United States lacked capacity, but because it held that the state agencies lacked the capacity; and in this field it takes two to make a bargain. Insistence here, as in the *Burnison* case, that a state cannot interpose an obstacle to a federal constitutional power is a misapplication of what in some circumstances is sound constitutional doctrine.

C. CONCLUSION.

We believe it a fair statement that appellants' brief marshalls no decisions of this or any other Court in conflict with the authorities reviewed under Points II, C and III, above. As to II, C, we have pointed out that only three of the cases there discussed do appellants even mention, *supra*, p. 60. As to the cases cited under this, Point III, we can find only one reference in appellants' entire brief which would

seem to suggest any departure from our discussion of the authorities. That is a one-sentence dictum from *Nebraska v. Wyoming*, 325 U. S. 589, 615, quoted and twice referred to by appellants (Br., pp. 24, 60, 80-81) as follows: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."[21] Appellants argue, at the pages of their brief above cited, that this sentence demonstrates the Secretary of the Interior and the Bureau of Reclamation may properly override state law.

Although appellants' position forces them to make such an argument, it seems evident that the one-sentence dictum from *Nebraska v. Wyoming* could hardly have the meaning attributed to it. Such a meaning would be in conflict with the entire line of cases discussed under Points II, C and III as well as the decision in *Nebraska v. Wyoming* itself.[22]

From the discussion under Points II and III we submit, therefore, that these conclusions follow: Congress has elected to proceed by contracts made with irrigation districts, created under such law as the state has chosen to provide. The subject matter of the contracts is the use of water

21. To this dictum the researches of the Solicitor General (Memorandum for the United States as Amicus Curiae in Support of Jurisdiction, filed June, 1957) added a single case, *Clackamus County, Oregon v. McKay*, 226 F. 2d 843 (D.C. Cir.), certiorari denied, 350 U.S. 904, which involved neither state waters nor the Reclamation Act.

22. The passage of the *Nebraska v. Wyoming* opinion with which the quoted sentence concludes reads as follows (325 U.S. at p. 615):

> "It is argued that if the right of the United States to these water rights is not recognized, its management of the federal projects will be jeopardized. It is pointed out, for example, that Wyoming and Nebraska have laws which regulate *the charges which the owners of canals or reservoirs may make for the use of water*. But our decision does not involve *those matters*. We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." (Emphasis ours.)

for irrigation purposes, a matter which Congress has determined to leave within state jurisdiction. Accordingly, the present contracts cannot be held valid unless they are authorized by the law of California. If that law does not permit the unlimited title to the waters required by the United States under the contracts, the contracts are invalid. Similarly, if state law does not authorize an irrigation district to enter into such a contract, each such contract is invalid. Federal law, according to the congressional plan, cannot supply the contracting authority with the necessary capacity.

Moreover, under the distribution of powers between federal and state governments provided by the Constitution, Congress could not have taken any course other than to leave these matters to state jurisdiction. Congress cannot here rely upon any specifically enumerated power, other than the power to tax and spend for the general welfare and the property-disposing power. But these powers do not permit the United States to regulate, coerce and override state law in any sense pertinent to the instant cases. The decisions of this Court affirm that, in exercising these powers, respect must be given to state law.

The contracts have been subjected to the test of state law. By that test they are invalid.

IV. The Acreage Limitation Provisions of the Contracts Result in a Denial of Due Process and Equal Protection Under the Fifth and Fourteenth Amendments.

A. THE PROVISIONS CONTAINED IN THE CONTRACTS.

The acreage limitation provisions (R. 36-40, 213-216, 497-501) are practically identical in each of the contracts now before the Court. In order to illustrate the workings of these provisions in a particular instance, we examine the pro-

visions of the Madera contract and its relation to the lands of the Albonicos, who are appellees herein

Phillip and Jane Albonico, husband and wife, owned 1,280 acres within the boundaries of the Madera Irrigation District. (R. 403-4, 411.) Since the formation of this district in 1920 they and their predecessors in interest paid their annual assessments, a portion of which was used to acquire the dam site at Friant, California, and to initiate appropriation of water for the Madera Irrigation District from the San Joaquin River. (R. 301, 220.)

After years of litigation between the Madera Irrigation District and Miller & Lux, finally resulting in a definition of the rights that the district could acquire in the San Joaquin River, it was determined by the State of California in its Central Valley Plan that the dam site at Friant and the appropriative filings of the Madera Irrigation District were necessary for the operation of the Central Valley Project. (AJS 142-43.) When the United States took over construction of the project, a contract was entered into between the Madera Irrigation District and the United States by which the dam site and gravel pit at Friant and the appropriative filings on the San Joaquin River were assigned by the district to the United States. In return for this assignment the United States paid the district the sum of $300,000 in cash, and granted to the district assurances that a canal would be constructed from Friant Dam to serve the lands of the district, and that the district would have a right to acquire a supplemental water right for delivery at points along the Madera Canal averaging 270,000 acre feet of water per year. (R. 220-232.)

This contract, made on May 24, 1939, did not contain any of the acreage limitation provisions which are found in the contracts now before the Court. As appears from the ex-

planatory clauses of the 1939 contract, the United States and the district both recognized that lands within the district were in need of a supplemental water supply, that the district had formulated a plan of putting a dam at Friant to make a water supply available to all the lands within the district, and that the transfer of the dam site and the water filings to the United States was made in the expectation that the United States would construct the Madera Canal and supply a supplemental water supply from Friant Dam through the canal to be made available to the district.

After the execution of the 1939 contract, the Albonicos continued to pay the assessments against their lands within the district, but upon learning the terms of the proposed contract between the United States and the district which was subsequently executed on May 14, 1951, they petitioned for exclusion of all of their lands except 320 acres thereof from the district boundaries. The terms of the contract to which they objected, among others, were the acreage limitation provisions. As applied to their lands these provisions meant the following:

(a) Under the terms of the contract they were now designated as "large landowners" by reason of the fact that they owned more than 320 acres (husband and wife being entitled to 160 acres each).

(b) The contract required them to designate which of their lands were to be considered non-"excess" lands, with the remainder to be considered as "excess" lands. In the event that they failed to make this designation, the district was authorized to make it for them, or if the district failed to designate, then the Secretary of the Interior would make the designation.

(c) In the event that they desired to sell any of their "excess" land, and the sale price were not approved by

the Secretary of the Interior, the land sold would be forever barred from receiving any water from the district or any service from the district.

(d) The district was to agree that it would furnish no water or service to their "excess" land unless the Albonicos executed a contract in which they agreed to sell all of their "excess" land under terms and conditions satisfactory to the Secretary of the Interior at a price approved by the Secretary of the Interior and fixed by appraisers, in the selection of whom the Albonicos had no voice, or, failing such a sale, the sale would be made by the Secretary of the Interior. In making the appraisal for any sale of "excess" lands no value was to be given the lands on account of the existing or prospective possibility of securing water or service from the distribution system of the district.

The Albonicos further ascertained that:

> "* * * the administrative procedure usually adopted has been to refuse to deliver water to any lands, excess or non-excess, until the owner of the excess land has executed a recordable contract agreeing to dispose of the excess." (Land Ownership Survey on Federal Reclamation Projects, Department of the Interior (1946), p. 47, Exh. 47 in *Madera*, Rep. Tr. 43.)

At the hearing before the board of directors of the district on the Albonicos' petition for exclusion of their "excess" land, evidence was introduced which showed that the lands to be excluded would not be benefited by the operations of the Madera Irrigation District, if the district refused those lands a water service. No evidence was introduced to show that the lands would be benefited by the operation of the district, if a water supply was refused to them. (R. 412.)

B. THE ACREAGE LIMITATIONS ARE UNWORKABLE, UNREASONABLE AND ARBITRARY WHEN APPLIED TO AN ESTABLISHED AGRICULTURAL ECONOMY.

As the court in *Ivanhoe* pointed out (AJS 42), the acreage limitation provisions, and other similar limitations found in congressional acts, reach the desired end in situations where the Government is providing free land and water supplies to homesteaders. An attempt to apply the limitation provisions, however, to an established agricultural economy results in hardships and inequities. The trial courts specifically found that the acreage limitation provisions of the contracts were unworkable, unreasonable and arbitrary. (R. 156, 333-34.)

Insofar as the districts are concerned in laying out their distribution systems, they have no way of knowing whether "excess" land will ever become non-"excess," or whether non-"excess" land will become "excess." Where a large block of land is held by a single owner who has not signed a recordable contract at the time of the design and construction of the system, the district is at a loss to know whether to provide lateral systems for each 160 acre parcel owned by him or to provide service only for his non-"excess" land. If the district chooses the former course, the laterals may lie dormant for years. If it chooses the latter course, the land may be sold to non-"excess" holders who would then have no lateral system to supply them. This problem is magnified when we realize that the size and carrying capacity of the main lateral distribution ditches depend upon the number of acres that must be served from that particular ditch.

The greatest hardship and inequity, however, falls upon the individual farmer. Let us again examine the position of the Albonicos. For 31 years they had paid assessments to

the Madera Irrigation District for the express purpose of providing a water supply for all of their land. After the execution of the contract here in question, 960 of their 1,280 acres continued to be assessed at the same rate as their other land, although denied a water supply from the district. (R. 301.)

Pipelines that have long been established and used for the irrigation of lands within the district now must be abandoned because they feed "excess" as well as non-"excess" lands. The development of their non-"excess" lands for a supply from the district is also jeopardized because upon the death of either of the Albonicos, if the survivor succeeds, immediately one-half of their 320 acres becomes "excess" land and the water supply and service from the district is denied to that portion. The survivor, however, faces a more serious problem than this, that is, forfeiture of the "excess" 160 acres to the United States, if it is not sold at a price approved by the Secretary of the Interior within a five year period from the date of his spouse's death. This, at least, we understand to be the position taken by the United States, claimed to be based upon Section 3 of the Act of August 9, 1912, as amended by the Act of July 11, 1956 (37 Stat. 265, 70 Stat. 524, 43 U.S.C. 544), which provides:

> "* * * but any such excess land acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, may be held for five years and no longer after its acquisition, and water may be temporarily furnished during that time; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction."

As we have previously pointed out in this brief, the Supreme Court of California determined the constitutionality of the acreage limitation provisions solely in relation to the California Constitution. For that reason, among others, we do not feel that this Court should assume jurisdiction of these cases. In the event jurisdiction is assumed, however, we point out that the provisions of the contract when applied to irrigation districts and landowners therein constitute a deprivation of property under the due process clauses of both the State and the Federal Constitutions.

We have before us a situation which involves the power and right of an irrigation district to enter into the contracts here in question. It must be remembered in this connection that an irrigation district is empowered to assess and in practice does assess all of the lands within its boundaries on an *ad valorem* basis on account of the costs and expenses that it incurs under the contract with the United States. (R. 301.) Thus, we have quite a different question from what we would have if the United States were contracting directly with individuals and imposing the limitations where the individuals had the choice of contracting or not. In the application of the acreage limitation provisions in a contract with an individual farmer, it at least could be argued that the farmer had the choice of accepting the so-called "benefits" under the contract in return for the imposition of the limitation provisions upon his land. This choice is not present to a landowner within the boundaries of an irrigation district, which decides whether or not to contract in a manner which may be contrary to the wishes of the individual landowner. If the landowner resides outside the boundaries of the district, as did McCracken, he has absolutely no voice in determining whether or not the acreage limitation should be applied to his lands within the bounda-

bility that later you may wish to change your designation of non-excess land, the appraisal board will appraise all your land in order to facilitate a redesignation at a later date if it becomes desirable.

"If you have questions, it is recommended that you contact your District Board of Directors and discuss with them the designations you plan to make. Naturally, I or one of my staff will be glad to answer questions or to discuss the procedures with you at any time.

"Sincerely yours,

"/s/ R. W. SMITH
"R. W. Smith
"Acting District Manager".

(McCracken Exhibit 80, *Ivanhoe*, Rep. Tr. 71, April 3, 1951.)

ries of the district. (Water Code, Section 20527; R. 154.)

Before the due process clauses of either the State or the Federal Constitution are invoked, it is, of course, necessary to determine what property right is affected. The Supreme Court of California found the acreage limitation provisions unconstitutional as a denial of due process and equal protection under the State Constitution, upon the basis that they deprived the districts, and the landowners within, of the following types of property rights either specifically referred to by the court or necessarily implied by its discussion:

(1) The inchoate right of landowners within districts to receive their just portion of waters held by the state in trust for its people. (AJS 32-33.)

(2) The right to receive their just proportion of the waters secured by the Madera and Ivanhoe Irrigation Districts for the irrigation of lands in the districts. (AJS 29.) This right to receive their just proportion of the water of the districts is more than a mere statutory right, as is enunciated by Section 22250 of the Water Code; the bringing of such rights to fruition is the basic purpose for which an irrigation district is formed. The leading case upon this point is *Jenison v. Redfield*, 149 Cal. 500. There the court stated:

> "The whole object of the legislation authorizing the organization of irrigation districts is to enable owners of lands susceptible of irrigation from a common source, and by the same system of works, to form a district composed of *such lands*, which district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation *thereof, thus enabling each one to have for his land in the district, the benefit of a common system of irrigation*, and bringing about the reclamation of the land of the district from aridity to a

condition of suitability for cultivation." (P. 503; emphasis in part the court's, in part ours.)

See also *Lindsay-Strathmore I. Dist. v. Superior Ct.*, 182 Cal. 315, 335-36.

(3) The right to own, use, acquire, purchase, sell, convey, dispose of by gift or testate succession, till and cultivate land, subject only to lawful restrictions.

(4) The inchoate right of the landowners in the *Madera* and *Albonico* cases to receive their proportionate share of the waters of the San Joaquin River covered by the applications to appropriate water which were filed by the Madera Irrigation District and assigned to the United States under the 1939 contract. This inchoate right, together with their rights in the dam site and gravel pit which were also assigned to the United States by the district, have now, by the 1939 contract, been converted into a right to receive a water supply from the United States through the district pursuant to the terms of that contract. It should be remembered in this regard that nowhere in the 1939 contract is there any provision limiting the use of the water supply to be furnished by the United States to non-"excess" lands, but to the contrary the contract speaks of furnishing a water supply for all of the lands lying within the boundaries of the district. (R. 220.)

(5) The right of the landowners within all of the districts to receive a benefit for any assessment levied by the district upon their lands. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112.

If we assume for argument that a federal question is presented and we are required to apply the doctrines of the equal protection and due process clauses of the Federal Constitution to the limitations herein questioned, we submit

that the acreage limitations when applied to contracts with irrrigation districts must fail.

While it could be argued that the Fifth Amendment to the Constitution of the United States should be brought into play in view of the fact that the United States is one of the contracting parties, insofar as the landowners of the districts are concerned the district itself is the contracting entity which enforces the provisions of the contract and, it being a state agency, the Fourteenth Amendment of the Constitution of the United States would be the applicable federal provision. However, we invoke the protection of the Fifth Amendment to the extent applicable.

In the case at bar we have a taking of the vested rights of property heretofore described by the imposition of the land limitation provisions in the contracts with the districts:

(1) The right of free ownership, use and disposition of land has been destroyed. After the execution of the contract, a landowner is not entitled to sell any of his excess land except at a price approved by the Secretary of the Interior; if he does so, the land is forever barred from receiving water or service from the district. As a practical matter this means that every acre of "excess" land within every irrigation district in the Central Valley Project must be sold at a price approved by the Secretary of the Interior. This provision of the acreage limitation portions of the contract is so often overlooked that it bears further explanation. The contracts specifically provide that even if an excess landowner does *not* sign a recordable contract, he still cannot sell his excess land at a price above that fixed by the Secretary of the Interior. If this provision is disregarded and the sale price is not approved by the Secretary, then the purchaser of the land is forever barred from receiving

services or water from the district. (R. 213, 214.) To say that this is not a restriction on the power to dispose of land is to ignore the practical aspects of sales of land within an irrigation district. No purchaser in his right mind would acquire land within the boundaries of a district which is subject to district assessments but is forever barred from receiving water or service from the district.

(2) The right of free succession has been unreasonably restricted. After the execution of the contract, let us assume that a landowner within an irrigation district, receiving project water, inherits additional land, also receiving project water, and that his combined holdings thereafter exceed 160 acres. The land so acqured by inheritance, to the extent of the excess of the total over 160 acres, must be disposed of within five years at a price set by the Secretary of the Interior, or the land is forfeited to the United States. Such, at least, we understand to be the Government's view of the effect of the Act of August 9, 1912, as amended, *supra*, p. 81.

(3) The right to have benefits in return for assessments has been disregarded. The landowner is now denied water or service from the district for his excess lands, but they remain subject to the district assessment. In *Albonico*, the court specifically found as a fact that unless water was delivered to the excess lands of the Albonicos they would not receive any benefit from the operation of the district. (R. 412.) In this connection the argument is sometimes used that lands which do not receive a direct benefit from the district operations nevertheless receive an indirect benefit by an increase in their value due to district operations. Such, however, is not the case under the terms of the contracts now before the Court, because the contracts specifically limit the sale price of the "excess" land to a price

which does not reflect any present or prospective benefit that the land would receive by reason of the project, its works, or any water delivered therefrom. (R. 214.)

(4) The right to a proportionate share of district water has been contravened. After the execution of the contract, all lands in excess of 160 acres owned by an individual within these districts are deprived of a proportionate share of the district's water supply unless the owner accedes to a sale at a price over which he has no control. (R. 34.) This provision of the contract completely thwarts the very purpose for which the district was formed. Excess land is deprived of irrigation from the common source (the project works). Water Code, Section 20700.

(5) The right to receive a fair share of state waters has been overridden. The contract precludes landowners from receiving state-controlled water for their lands in excess of the arbitrarily-prescribed limits.

It would seem from the foregoing examples that the property rights of the landowners within the districts here in question have been impaired and taken without due process of law. We believe that this is especially true where the district, as the contracting agency for the landowner, gives the landowner no choice in determining whether or not his land shall be subject to the provisions in question, while at the same time the district levies assessments upon his lands, whether "excess" or non-"excess". In view of the finding of the trial court in the *Albonico* case that the "excess" lands would not be benefited by the operations of the district without the delivery of water to those lands, we feel that the case comes peculiarly within the due process rule. The assessments levied by an irrigation district are in the nature of special assessments: See *Fallbrook Irrigation District v. Bradley, supra,* 164 U.S. 112, 162. This

Court, in discussing the benefits which must accrue to property in order to authorize a special assessment, stated in *Norwood v. Baker*, 172 U.S. 269:

> "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." (P. 279; emphasis the Court's.)

The acreage limitation provisions of these contracts also constitute a denial of equal protection of the laws. In *Shelley v. Kraemer*, 334 U.S. 1, this Court laid down the applicable rule:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." (P. 10.)

The reasoning of the Court in that case fits the facts in the case at bar. The plan of operation of the district discriminates between the owners of the land who have holdings of 160 acres and less and those who have holdings of more than 160 acres, without any rational justification. *Yick Wo v. Hopkins*, 118 U.S. 356.

In re Owl Creek Irr. Dist., 71 Wyo. 30, opinion on denial of rehearing, 71 Wyo. 70, held such contracts unfair and unconscionable. No review by this Court was attempted.

Appellants seek to escape the force of the foregoing well-

settled principles by claiming that the projects involved constitute a mere subsidy by the Federal Government to the landowners within the irrigation districts, and for that reason the acreage limitations may be validly imposed.

To support their argument in this regard quotations from a letter by Congressmen are used to paint a distorted picture of the true facts. (App. Br., p. 53.) The expedient used to reach the results set forth in appellants' brief is to charge to the landowner the cost of the facilities installed to produce power, and then to claim that the revenues received from power sales constitute a "subsidy" to him. An examination of the facts shows the fallacy of this reasoning.

The Central Valley Project is a multi-purpose project. That portion of the cost of the project which is attributable to flood control, recreation and fish and wild life preservation is nonreimbursable under Federal law. The remaining portion of the cost of the project is reimbursable and is paid from two sources, the charge to the irrigator for delivering water and the charge to the power user for delivery of power. See Sen. Doc. 113, 81st Cong., 1st Sess., Exh. 56 in *Madera*, Rep. Tr. 43. While it is true that without the power features the cost of producing irrigation water would be greater, it is also true that without the irrigation features the cost of producing power would be greater. In all project planning, whether on a state or a federal level, wherever possible multi-purpose projects are inaugurated and used because they produce both power and irrigation water at a cheaper rate than would be otherwise available. To say that the irrigator is being subsidized from power revenues is no more true than to say that the power user is being subsidized from irrigation revenues. The facts are that under a multi-purpose project both irrigation water

and power can be produced at a lower rate than under a single purpose project for either water or power alone.

Appellants may contend that the interest-free use of federal funds for the construction of the irrigation features of the project constitutes a subsidy. Even this so-called subsidy is wholly fictitious. It is contemplated that the entire cost of the irrigation features will be recouped over the forty-year life of the contracts. Yet neither the statutes under which the contracts were written nor the contracts themselves provide for a cessation or reduction of charges for water after the expiration of the contract periods. Consequently, for all that appears in the present contracts, the United States will receive additional funds from water users after these costs have been fully recovered. (McCracken Exh. 52, p. 734, Rep. Tr. 87, April 3, 1951.) In addition to these charges to water users, the United States continues to derive revenue from power users. To say that interest is not charged is to indulge in semantics. The United States will actually derive revenues far in excess of the capital costs, whether such excess be called interest or something else. Congress has attempted to make provision for this situation (see *supra*, p. 40, fn. 10), but its action is not reflected in the present contracts.

Viewed in this light the so-called subsidy to the irrigator disappears, and does not authorize the arbitrary and discriminatory requirements of the acreage limitation provisions, nor could it justify the taking of the property rights we have heretofore discussed without due process of law.

We do not believe that the Court will find it necessary to resolve the grave constitutional doubts which we have suggested in this Point IV of our brief, particularly in view of the long-settled rule that such questions will be

approached and decided only when they are absolutely necessary to a decision. Cf. *American Communications Assn. v. Douds*, 339 U.S. 382, 407. We submit that dismissal of these appeals or affirmance of the court below is compelled by the considerations advanced under our Points I, II and III. However, in view of the broad scope with which appellants seek to invest these cases, the foregoing brief outline of well-settled constitutional principles and their application to the present cases has been presented. Such principles furnish additional grounds for affirmance.

CONCLUSION

For the reasons stated, the appeals should be dismissed and certiorari denied. If, on the contrary, the Court should believe that substantial federal questions are presented, the judgments below should be affirmed.

Other alternatives would be presented only in the event that, contrary to our contentions, the Court does not dismiss, deny or affirm. Even in that event the Court would not be warranted in ending the litigation by reversing the judgments below. Questions of state law would still remain for determination by the Supreme Court of California, including if necessary issues heretofore left undecided.

Dismissal of the appeals and denial of certiorari or, as the case may be, affirmance of the judgments below, will not mean, we submit, that the Central Valley Project or the Cachuma Unit will fall into disuse. Dismissal, denial or affirmance, on the contrary, will free both Washington and Sacramento from the restrictive and outmoded concepts

with which their dealings have been entangled. The way will then be open for new arrangements or contracts which comply with state law and which are fair both to the Federal Government and the people of California.

Respectfully submitted,

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March, 1958

(Appendix Follows)

Appendix

"UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Reclamation Region 2
Tulare Basin District
318 Patterson Bldg.
Fresno, Calif.

November 1, 1949

Registered Mail Return Receipt Requested

"Mr. Courtney McCracken
c/o Hotel Johnson
Visalia, California

"Dear Mr. McCracken:

"The water service contract between the Ivanhoe Irrigation District and the Bureau of Reclamation provides that every landowner within the district may receive his fair share of Friant-Kern Canal water up to enough for 160 acres per individual owner in accordance with Reclamation Law. However, when more than 160 acres of irrigable land are held per individual owner, the excess land provisions of the contract apply to the use of such water on the land in excess of that amount. The excess land provisions do not place any restriction on the amount of land an individual may own or on the use of water he may get from some other source. The limitations apply to the use of water delivered from the Friant-Kern Canal, a part of the Central Valley Project. There are two fundamental provisions which require that:

"1. If excess land is sold, it is not to receive water from the Friant-Kern Canal unless the purchase price involved in such sale is not more than the value established by an unbiased, three-man appraisal board which will appraise the land on the basis of its current market value with no consideration to any increment which may have occurred because of availability of water through Federal Reclamation structures, and;

"2. Water made available to your district, pursuant

to the District—Bureau of Reclamation contract may be furnished to excess land providing the landowner executes a recordable contract with the Government agreeing to dispose of his excess land within ten years at not more than the appraised value established by the appraisal board. Such a recordable contract would provide that if the landowner does not sell his excess land in ten years, the Secretary of the Interior may sell it for him at the appraised price and under such terms and conditions as are satisfactory to the owner. If the landowner does not desire to receive Friant-Kern Canal water for his excess land, he does not need to sign a recordable contract.

"In order to administer these two fundamental provisions, the Ivanhoe Irrigation District-Bureau of Reclamation contract requires that each large landowner shall designate the 160 acres to which he is entitled water without restriction. The land so designated is then known as his 'non-excess' land and is not affected by the excess land provisions and does not require the signing of a recordable contract to receive Friant-Kern Canal water. The stipulations of the contract are that large landowners shall designate their non-excess land within a period of 30 days after notification by the Government, and that if the owner fails to designate his non-excess land, the District will do it for him; or finally, that in the event both the landowner and the District fail to act, it will be designated by the Government. The contract also provides that all 'excess' land will be appraised, so that it readily may receive water in the event the owner desires to sell it or to sign a recordable contract.

"It is our understanding that you own approximately 285 acres of irrigable land in the Ivanhoe Irrigation District and the purpose of this letter is to formally request that within the next 30 days, you designate the 160 acres which

you wish to have considered non-excess for which there will be no restriction for water delivery under Reclamation Law. Would you please inform the Ivanhoe Irrigation District, by letter of transmittal, in duplicate, the 166 acres you desire to designate to receive project water, in accordance with Article 36(a)(ii) of the Water Service Contract.

"It is recognized that at some future time the construction of a distribution system or some other logical reason may make it desirable for you to change the tract of land which you wish to have considered as 'non-excess' and to which there will be no restrictions regarding the delivery of Friant-Kern Canal water. Ordinarily, such a redesignation will be allowed providing the contracting authority for the Government is assured that such a request is reasonable.

"An appraisal board is being organized now and will consist of one member who is a staff appraiser for the Bureau of Reclamation; one member who is designated by the Ivanhoe irrigation District; and a third member selected by the first two. They will want to proceed as rapidly as possible with the appraisals. The board will want to contact you when appraising the land and you should take that opportunity to describe to them any unusual values or conditions peculiar to your land. For your information, reappraisals may be made at any time at either your request or at the request of the Government in order to keep the appraisal price in line with current land values, or take into account improvements on the property subsequent to the initial appraisal. The cost of the appraisal will be at Government expense. If reappraisals are desirable, the first reappraisal made at your request and all reappraisals made at the Government's request, will be at Government expense, but if you request more than one reappraisal, a nominal charge will be made to help defray expenses. Because of the possi-